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A

TREATISE

ON THE

LAW

RELATIVE TO

MERCHANT SHIPS AND SEAMEN:

IN FOUR PARTS;

I. OF THE OWNERS OF MERCHANT SHIPS;
II. OF THE PERSONS EMPLOYED IN THE NAVIGATION THEREOF;
III. OF THE CARRIAGE OF GOODS THEREIN;
IV. OF THE WAGES OF MERCHANT SEAMEN.

BY CHARLES ABBOTT,

OF THE INNER TEMPLE, BARRISTER AT LAW.

WITH THE COPIOUS ANNOTATIONS OF

JOSEPH STORY,

One of the Judges of the Supreme Court of the United States.

THIRD AMERICAN EDITION, IMPROVED AY A DIGEST OF AMERICAN DECISIONS SUBSEQUENT TO JUDGE STORY'S NOTES.

EXETER, N. H.

PUBLISHED BY GEORGE LAMSON.

J. J. WILLIAMS PRINTER.

1822.

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1822

District of New-Hampshire to wit:

L. S.

BE IT REMEMBERED, that on the thirtieth Day of July, in the forty-sixth Year of the Independence of the UNITED STATES of AMERICA, George Lamson of the said District, has deposited in this Office the title of a Book, the Right whereof he claims as Proprietor, in the Words following, to wit:

A Treatise of the Law relative to Merchant Ships and Seamen: in four parts; I. Of the owners of Merchant Ships; II. Of the persons employed in the Navigation thereof; III. Of the carriage of goods therein; IV. Of the Wages of Merchant Seamen. By Charles Abbott, of the Inner Temple, Barrister at Law. With the copious Annotations of Joseph Story, one of the Judges of the Supreme Court of the United States. Third American edition, improved by a Digest of American Decisions, subsequent to Judge Story's Notes.

In Conformity to the Act of the Congress of the United States, intitled, "An Act for the Encouragement of Learning, by securing the copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the times therein mentioned;" and also to an Act intitled, "An Act supplementary to an Act intitled, An act for the Encouragement of Learning, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies during the times therein mentioned; and extending the Benefits thereof to the Arts of Designing, Engraving and Etching Historical, and other Prints."

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PREFACE.

CONSIDERING the great importance of every branch of law relating to Maritime Commerce, it is a matter of surprise that no treatise on the subjects discussed in the following sheets should have been written by any member of the profession of the law for a very long period of years. It is now more than a century since the first publication of the work of *Molloy*, the only *English Lawyer*, who has written on these matters. During that period the law of the country has grown up with its commerce; many interesting points have been argued by able and eloquent Advocates, and decided by learned and enlightened Judges; and some very important regulations have been introduced by the Legislature: but very little of useful addition has been made to the collection of *Molloy*, either by the subsequent editors of his treatise, or by the other authors, who have written on the same topics. Yet the absence of a general and established code of Maritime Law, which almost every other European nation possesses, seems to render a collection of the principal points of that law peculiarly necessary both for English merchants and English lawyers. On the subject of Insurance, this has been already effected. In the present treatise an attempt is made to supply the defect in some other branches. And in order to render the work

as generally useful as the nature of it will allow, great care has been taken to avoid the use of technical phrases, wherever the form and manner of legal proceedings are not the principal points of consideration. The reader, who is of the profession of the law, may, I fear, sometimes be disgusted at this; and at other times censure the awkward expressions substituted for the language, to which his ear is familiar. The only excuse, that can be offered for the latter fault, is the difficulty of expressing ideas, to which the mind is habituated, in any other words, than those to which we are accustomed: a difficulty, of which the conversation of all persons, who are engaged in any art or science, furnishes daily experience.

The treatise now offered to the public is compiled not only from the text writers of our own nation, and the reporters of the decisions of our own Courts, but also from the books of the Civil Law, and from such of the maritime laws of foreign nations, and the works of foreign writers, as I have been able to obtain a knowledge of. A few decisions of the House of Lords, are quoted from the printed statements delivered by the contending parties and the Journals of the House. Some judgments pronounced by English Judges are also introduced, which have not hitherto been made public; for the most valuable part of these I am indebted to *Mr. Justice Lawrence*, and particularly for the cases of *Parish* and *Crawford*, *Appleby* and *Pollock*, and *Day* and *Searle*; the case of *Mackrell* against *Simond* and *Hankey* was communicated to me by the late *Mr. Justice Buller*, who, when at the bar, argued it on behalf of the Defendants; the rest are cited from notes taken by myself or my professional friends. Indeed I am indebted to my friends not only for

assistance of this kind, but also for the loan of scarce books, the correction of some errors, and the suggestion of many valuable hints for the improvement of the work. Of the assistance thus afforded me I shall ever entertain the most grateful remembrance, and my reader will experience the advantage in many parts of this book.

The Ordinances most frequently quoted are those of Oleron and Wisbuy, the two Ordinances of the *Hanse-Towns*, and the Ordonnance de la Marine du mois d'Aoust 1681. The Ordinances of Oleron and Wisbuy and the first Hanseatic Ordinance are in the hands of every lawyer: and whenever the Hanseatic Ordinance is mentioned generally, the reader will understand this to be spoken of. The Hanseatic Ordinance of the year 1614 was published with a Latin translation and commentary by *Kuricke* in a small quarto at Hamburgh in the year 1677. This book is very scarce in this country: the Ordinance itself is arranged and divided, and contains some additional regulations; which however are little more than a detail of the principles comprized in the first Ordinance. Reference is also occasionally made to such other foreign Ordinances as are to be found in the second volume of *Magen's* Essay on Insurances. I have often lamented my inability to consult the earliest maritime code of modern Europe, the Consolato del Mare. There is an old French translation of this body of laws, but I could never meet with it, and I am ignorant of the Spanish and Italian languages. Whenever therefore I have referred to this code, the reference is taken from the work of some other author: and it is made for the purpose of giving an opportunity of consulting the original to those, whose superior attainments enable them to do so.

The Ordinance of Louis the Fourteenth is quoted from the edition published with a most learned and valuable commentary by *Valin* in two volumes quarto at Rochelle in the year 1766, and is cited by the name of the French Ordinance. An English translation of the whole of this Ordinance is contained in a book called, "A general Treatise of the Dominion of the Sea, and a complete Body of Sea Laws," published in quarto in the early part of the last century. The translation is divided into sections, and not like the French of *Valin* into books and titles; but the subjects and articles of the sections in the English are the same as those of the titles in the French; and as the latter are always cited in the notes to this treatise, recourse may be had to the English translation with very little difficulty. If the reader should be offended at the frequent references to this Ordinance, I must request him to recollect that those references are made to the maritime code of a great commercial nation, which has attributed much of its national prosperity to that code: a code, composed in the reign of a politic Prince; under the auspices of a wise and enlighted Minister; by laborious and learned persons, who selected the most valuable principles of all the maritime laws then existing; and which in matter, method, and style, is one of the most finished acts of legislation that ever was promulgated.

The writings of some foreign authors are also occasionally cited; particularly the Notabilia of *Roccus*, and the treatises of *Pothier* and *Emerigon*. The Notabilia of *Roccus* are an abstract of the most useful points contained in the works of earlier authors, and in the digest and code of *Justinian*. Where this author is cited generally

the reference is to the Notabilia de Navibus et Naulo. The treatises of *Pothier* are remarkable for the accuracy of the principles contained in them, the perspicuity of their arrangement, and the elegance of their style. The treatise of *Emerigon* is peculiarly valuable for its extent of learned research, and the numerous and apt citations of the texts of the Civil Law and of the Marine Ordinances, the opinions of former writers, and the adjudications of the courts of Justice of his own country, which are to be found in every part of it.

It should be observed, however, not only of all these treatises, but also of the Civil law, and the Ordinances, without excepting even the Ordinance of Oleron (which, being considered as the edict of an English Prince, has been received with peculiar attention in the Court of Admiralty), that they have not the binding force or authority of law in this country; and that they are here quoted, sometimes to illustrate principles generally admitted and received; sometimes to shew the opinion of learned persons, and the rule adopted in maritime nations upon points not hitherto settled by the authority of our own law; and at other times to furnish information, that may be useful in our commercial intercourse with foreign states.

In the composition of this treatise my object has been rather to arrange and illustrate principles, than to collect the decisions of Courts or the Acts of the legislature. The cases therefore are, with a few exceptions, stated in a concise manner; and the clauses of Acts of Parliament are abridged, whenever an abridgement seemed likely to to be as satisfactory to the reader as a transcript. Of the institutions of written law

the precise words are often necessary to a right understanding of the intention of the lawgiver. I should have saved myself much both of time and labour, if I had copied more and abridged less.

There are few reported decisions of our Courts of Justice, from which some useful principle may not be extracted; and I have therefore searched the books of reports with much assiduity. Nevertheless I am apprehensive that some valuable cases may have escaped my attention; and I shall feel myself greatly indebted to any one who will point out to me such omissions of this kind, as may fall under his notice, or acquaint me with any other defects or errors, that he may observe.

Relying on the kindness of those, who may peruse the book with a friendly disposition to its author, and the candor of those, who may look into it for the sake of information alone, I now offer it to the Public, and to the Profession of which I am a member, with a sincere desire that it may be found useful to both.

C. ABBOTT.

Inner Temple, Jan. 25th, 1802.

ADVERTISEMENT

TO THE

SECOND AMERICAN EDITION WHICH FIRST CONTAINED JUDGE STORY'S ANNOTATIONS.

THE work of Mr. Abbott, which is now reprinted, has acquired a deserved reputation for accuracy and extent of information. The subject is equally interesting to the lawyer and the merchant; to the statesman and the private gentleman. Whoever wishes well to the commerce of our country: whoever wishes to comprehend the advantages resulting from the timely patronage of government in maritime concerns: whoever wishes to learn the ancient as well as the modern systems of commercial monopoly or free navigation, will not rise from the perusal of this work without receiving light and instruction.

In preparing the present edition, the object of the editor was to collect cases and principles which have been discussed or settled in the courts of the United States, relative to the law of shipping. Sometimes he has contented himself with a bare statement of the point; at other times he has stated the facts and the opinions of the court at large. The importance of the question, or the ability with which it has been investigated, have been his general guides in this particular. Generally the foreign authorities quoted have been stated as he found them in the reports. In a few instances, however, he has recurred to the originals within his reach, in which he includes Valin, Emerigon and Straccha. He aspires to no other claim than that of an accurate selection from the labors of others. He wishes to be con-

sidered as in no instance expressing his own opinion; but as barely pointing out the path marked by judicial decisions or explored by elementary writers.

In some few cases he has added English authorities which were not noticed by Mr. Abbott, or have been published since the last edition of his work.

Salem, A. D. 1810.

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Addenda to Abbott on Shipping.

OWNERS OF SHIPS.

In Page 11. *Sect.* 5. A *bona fide* sale of a ship and cargo at sea is valid against all the world, provided the vendee use reasonable on the return thereof to take possession. Portland Bank v. Stacey, 4 Mass. Rep. 661.

If a ship be wrecked in a foreign port and abandoned, and afterwards sold by the government of that country, according to the laws thereof, the purchaser acquires a good title against all the world. Grant v. M'Lachlin, 4 John. Rep. 34.

GENERAL AVERAGE.

After note 1. p. 383. The doctrines here stated, seem fully supported by a recent decision in Massachusetts, in which the court held, that upon an involuntary stranding, where the ship was abandoned and a part of the cargo was saved in the ship's boat, the owners of the cargo abandoned were not entitled to a general average. And in the same case, a part of the goods saved in the boat, having been thrown overboard to save the lives of the crew; they further held that the owners of the goods thrown overboard were not entitled to a general average. *Wittredge* v. *Norris.* Essex, November Term, S. J. C. 1809. MSS.

After note 1. p. 386. The wages and provisions of the crew, during a detention to repair at a port of necessity, were adjudged a general average in *Padleford* v. *Boardman*, 4 Mass. Rep. 548.

LOSS AND FORFEITURE OF WAGES.

After note 1. p. 510. The principle of this decision was admitted in its fullest extent by Judge Davis, in a recent case. A ship was captured and recaptured, and a seaman taken out—not being able to rejoin the ship, after he was released, he returned to the United States, and the ship having in the mean time completed her voyage, brought his libel for full wages. It appearing that he had not earned wages in any other employment, the learned Judge, after argument, and taking time to consider, decreed to the seaman full wages up to the time of his return to the United States, deducting therefrom his proportion of the salvage paid to the recaptors. *Williams* v. The *Brig*—— March T. 1809. District Court of Massachusetts. MSS.

PART THE FIRST.

CHAPTER THE FIRST.

OF THE OWNERS OF SHIPS, IN GENERAL.

1. ONE or more persons may acquire the property of a Ship by building it at their expense, or by purchasing it of another, who has authority to dispose of it. Upon the death of the owner, his interest devolves upon his executors or administrators, his personal representatives. In the case of purchase, however, it is necessary that the person, who takes upon him to sell, should have power to do so; for although a sale of other goods by the person, who is in possession of them, does in many cases vest the property in the buyer, even when the seller himself has neither property in them, nor authority to dispose of them, the same cannot take place with respect to ships, as there is no open market for the sale of them. Indeed this species of property appears from very early times to have been evidenced by written documents, and at present always is so, which other move-

able goods rarely are ; and therefore the buyer has in this instance the means of ascertaining the title
[2] of any person, who offers to sell, and can seldom be deceived, except by his own fault. (1)

2. The master of a ship possesses, as more fully appears in different parts of this treatise, every power nec-

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(1) The words of Sir W. Scott, in a case of possession of a foreign ship before him, are too remarkable to be here omitted. "It has been contended in argument that the effect of a bill of "sale alone would not be material, because this was a foreign "ship, in respect to which it might not be requisite that it "should pass by a bill of sale. It is said that the agreement "to be found in these letters (i. e. in that case) and the actual "delivery under it, would be sufficient to establish the equitable "title ; and a reference has been made on this subject to some "opinions at common law, which are said to have been given "in favour of such a title. The opinions of gentlemen at that "bar must undoubtedly be entitled to entire respect on a ques-"tion of municipal law. But this is a question of a more gen-"eral nature, arising out of a system of more general law—out "of the universal maritime law, which constitutes a part of the "professional learning of this court and its practisers. Ac-"cording to the ideas which I have always entertained on this "question, a bill of sale is the proper title to which the mari-"time courts of all countries would look. It is the universal "instrument of transfers of ships in the usage of all maritime "countries, and in no degree a peculiar title, deed, or convey-"ance known only to the law of England. It is what the "maritime law expects, what the Court of Admiralty would in "its ordinary practice require ; and what the legislature of this "country has now made absolutely necessary with regard to "British subjects by the regulations of the statute law." The Sisters. 5 Rob. Adm. Rep. 155. [138].

essary for the employment and navigation of the ship; but he has not, unless in a case of extreme necessity, authority to sell the ship. And with a view probably to prevent the opportunity of fraud, which the allowance of this power to him might afford, several of the foreign (*a*) ordinances expressly declare, that he shall not sell the ship without a special authority for that purpose, from the owners; at the same time, however, authorizing him, in case of necessity, to borrow money upon the credit of the ship or its furniture, with the assent of his crew. And in conformity to these regulations, *Sir Matthew Hale*, when Chief Baron of the Exchequer, is reported to have decided upon a (*b*) case referred to, and argued before him, that the sale of a ship by the master did not convey the property to the buyer, although the sale was made in a foreign country, in a case of inevitable danger, the ship and tackle being beaten and broken, and no hope of saving any part of them, partly on account of the tempest, and partly on account of the barbarity of the inhabitants of the [3] country, who carried off every thing that was cast on shore. Perhaps, however, there might in this case be some circumstances, not noticed by the reporter, which might lead the learned Judge to doubt the absolute necessity of a sale, or to think the buyer a party to the misconduct mentioned in the book. In a subsequent case (*c*), wherein *Lord Chancellor Cowper* decreed that the *East India Company* should pay to the owner of a ship purchased of the master at *Batavia* for their use by

(*a*) *Consolato*, D. M. ch. 253. Laws of *Oleron*, art. 1; of *Wisbuy*, art. 13; of the *Hanse Towns*, art. 57. *French* Ordinance, Liv. 2. Tit. 1. *Du Capitaine*, art. 19. Ordin; of *Rotterdam*, art. 165. 2 Magens, 107.

(*b*) *Tremenhere v. Tresillian*, 1 Sid. 452.

(*c*) *Ekins v. E. I. Company*, 1 P. Williams, 395. 2 Bro. Parl. Cases, 72.

one of their agents, the difference between the real value and the sum paid to the master, with interest thereupon at the rate allowed in *India* (which decree was afterwards affirmed by the House of Lords,) his Lordship took notice *that the sale of the ship was not necessary :* The transaction indeed was a gross fraud between the master and the agent of the Company, but without their privity. By the Consolato del Mare, the master is allowed to sell the ship, if worn out by age (*d*). And it is said by one of the earliest English reporters, that "the master of a ship may in some cases sell the ship, "although it does not belong to him, as in the case of "famine (*e*), &c." This author does not cite the decision of any Court as an authority for the observation. The exception, however, of cases of extreme necessity rather fortifies than weakens, the general rule ; [4] and no person can safely purchase a ship of the master in any case, which does not clearly fall within the principle, upon which the exception is founded ; and such a case will rarely happen. And although the master be himself a part-owner of the ship, yet will not his sale thereof be good for more than his own part ; for the interest of part-owners is so far distinct, that one of them cannot dispose of the share of another ; whereas in articles of ordinary sale, one partner may in general transfer the whole property, if the transaction be without fraud.

3. The effect, however, of this interdiction of sale has been frequently evaded in foreign countries, by procuring a sentence of condemnation and sale of a ship, as unfit for service, from some Court or Judge having

(*d*) *Cap.* 253.
(*e*) *Jenkin's Centuries,* p. 165. Observation at the end of case 17.

jurisdiction in maritime affairs (*f*). No such jurisdiction is known to the law of England. The condemnations, as they are called, sometimes made abroad, upon the survey and report of captains or carpenters, have no binding force in this country, but the fact, upon which they profess to be founded, may be again litigated by the parties interested in disputing it. This was successfully done at a late trial before the present Lord Chief Justice of the Court of King's Bench, in a case (*g*) of which it will be proper to detail the circumstances, as there is too much reason to [5] fear that similar practices not unfrequently take place. The owners of the ship *Grace* sent her to *Jamaica*, under the command of one *Cook*, with a cargo consigned principally to *M'Anuff* and *Cunningham*, and with orders to follow their directions in respect to his loading back, and to apply to them for money for the use of the ship. On the 23d of *February* 1802, after the discharge of her cargo, the ship was driven on shore at *Rio Bueno* in *Jamaica*, in a gale of wind. The master applied to *Cunningham*, who resided at *Montego Bay*, for advice in this emergency, and on the 27th of *February* made the usual protest. On the same day, the deputy naval officer at *Montego Bay* directed his warrant to four masters of ships, desiring them to examine the *Grace*, and make a return upon oath of her state and condition. They reported, that they had been on board, and found the ship settled in a sand bank four feet, with a bank of sand between her and the sea of twice her length, and not more than two feet water on the sand bank; and that they were therefore unani-

(*f*) See *Valin* on the *French* Ordinance, tom. 1. p. 444.

(*g*) *Hayman & others v. Moulton & others*, Sitt. at Guildhall, *Nov.* 1. 1803. There is a report of this case in 5. *Espin* N. P. C. p. 65.

mously of opinion, from the great expense that would be incurred in attempting to get her afloat, and the little chance of succeeding therein, that it would be most for the advantage of the underwriters, and all others concerned, to sell the ship as she then lay, with all her materials, to the best bidder. *Cunningham* advertised the ship for sale by auction *as a wreck:* he acted as auctioneer, and charged his commission, and she was sold on the 15th of *March*, to one *Dunn*, for [6] 1,210*l.* *Jamaica* currency, about 864*l.* sterling. One of the surveyors attended, and bid at the sale. *Dunn* sold the vessel to *Robert Moulton*, a brother of one of the defendants, who, upon his own oath of ownership, and surrender of her register, obtained a new register at *Jamaica*, and transferred her there to the three defendants, one of whom was one of the four masters by whom she had been surveyed. The vessel was got off the sand with considerable difficulty, but very little injured, and after some slight repairs returned to *England* with a cargo. The deputy naval officer here mentioned, is the deputy of an officer appointed by the governors of our colonies and plantations, to receive an account of ships and their cargoes upon their arrival there (*h*). The ship had cost 3,700*l.* before she left *England*, and was little more than three years old.

The owners being dissatisfied with this sale, brought the present action to try its validity; and at the trial it appeared by the evidence of *Cook*, and of three of the masters who had surveyed her, that they had paid very little attention to the ship itself, which was never pumped before they made their report; but they swore that they thought a sale the most prudent step to be taken

(*h*) 15 *Car.* 2. c. 7. sect. 8. & 7 & 8. *Wm.* 3. c. 22. sect. 5.

on account of the difficulty, expense, and hazard of removing her from her situation, and the little resources that *Cook* had for such a purpose. The plaintiffs contended, that the master of a ship could not [7] dispose of her in any case ; or that, admitting him to have this power in a case of absolute necessity, such necessity did not exist in this instance, and the whole transaction was a gross fraud.

The Chief Justice, *Lord Ellenborough*, offered to reserve the question, of the master's power to sell under *any* circumstances, for the consideration of the Court, if the verdict should render that point material ; and stated his own opinion to the Jury to be, that although the master had no general authority to sell, he had an implied authority, in cases of extreme necessity, to act for the benefit of the concern, exercising a sound discretion, such as the owner himself would exercise if he were upon the spot ; and that in extreme cases, and extreme cases only, he had power to sell, as in the instance of a wreck which could not be got off, and ought not to be left to perish absolutely. And he desired the Jury to consider, whether in this case there was such a necessity as would have induced the owner himself to sell if he had been present ; and, if they thought there was such a necessity, then, whether the sale in this instance was fraudulent. The jury found a verdict for the plaintiffs. (1)

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(1) The words of Lord Ellenborough, as sated in 5. Esp. N. P. Cas. 65. are " Where a case of urgent necessity and extraordinary difficulty occurs, where a ship has received an irremediable injury, under such circumstances,the captain acting *bona fide*, and for the benefit of the owners might sell the ship

In the course of the trial no regard was paid to the authority of the deputy naval officer, whose situation certainly gives him no manner of jurisdiction on such a subject. In commenting upon the evidence, the [8] Chief Justice adverted particularly to the circumstance of one of the surveyors having bid at the sale, and another become a purchaser before the ship left the island ; and observed, that it might be a useful lesson to teach such persons, that by accepting the office of surveyor, they elected not to become purchasers, or to derive any benefit from a sale.

And at a subsequent trial of an action (*i*), brought to recover the value of a ship, which had been in like man-

(*i*) *Andrews v. Glover.* Sitt. after before *Lord Ellenborough*, Ch. J. Trin. T. 46 Geo. 3 at Guildhall,

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for the benefit of the owners. This is the disposition of my mind, but I cannot lay it down as positive law. At all events it can only be justified by extreme necessity and the most pure good faith ; that is, if the vessel is in such a state, as it would be probable the owners themselves, if on the spot, would have acted in the same way as the captain has done." And in a subsequent case where a ship had put into a port in distress, and was there, on the application of the master, surveyed and adjudged unseaworthy, and sold by decree of a vice-admiralty court, although it was agreed that the sale was *bona fide* and made for the actual as well as intended benefit of all concerned, yet the court pronounced the sale invalid. Reid v. Darby. 10 East. Rep. 143. And the court were further of opinion in the same case, that a transfer of a ship in such case as between British subjects, supposing it good in other respects, must be made according to the requisites of Registry Acts. Perhaps if the ship did not specifically subsist, but was a mere scattered wreck it would be otherwise. *Id. ibid.*

ner condemned and sold at *Tobago*, as incapable of repair, and in which also the plaintiff succeeded, his Lordship said, that he considered a proceeding of this sort not as the sentence of a Court pronounced for the captors of a captured vessel, but rather as the inquisition of a Sheriff, for the purpose of information to those, who under certain circumstances have the power of selling the ship. Such an inquisition is not conclusive upon the party whose property is in question.

4. The (*k*) writers on maritime law inform us, that if a ship be sold with the tackle, apparel, furniture, and other instruments thereto belonging, the ship's *boat* is not conveyed by these words, and they found their opinion upon the authority of those parts [9] of the Digest, in which it is said that the *boat* is not a part of the ship (*l*), or of its apparel (*m*).

5. It has been observed, that the property of a ship is now always evidenced by written documents. And these documents not only furnish the owner with proof of his property, but also enable him to dispose of it, when the ship is at sea, or in a foreign port. When a ship is here in the country of its owner, and a delivery of actual possession is possible, such delivery is necessary to give a perfect title to the buyer, in case of a sale of the whole ship ; for although as between buyer and seller the sale may be completed by payment of the price without delivery of possession, yet if the buyer suffer the seller to remain in possession, and act as owner, and the seller in the mean time become bankrupt,

(*k*) *Roccus*, not. 20. *Straccha de Navibus*, pars. 2. num. 12. *Molloy de Jure*, *m.* & *n.* book 2. ch. 1 sect. 8. The latter adds, that if a ship commit piracy, the *boat* is not forfeited ; and refers to a case in *Roll's Ab.* for his authority : and *Beawes* has followed the words of *Molloy*. But in the case referred to, the *boat* is not mentioned.

(*l*) *Dig.* 21. 2. 44.

(*m*) *Dig.* 6. 3. 1.

the property will be considered as remaining in him to be disposed of for the benefit of his creditors (*n*); and sometimes also, if an execution issue upon a judgment against the seller, the sale may be deemed fraudulent and void as against the party who has obtained the judgment (*o*). But in case of a sale, or agreement for sale, of a part only, it has been thought sufficient, if the vendor, having delivered the muniments of his title, ceased from the time to act as a part-owner, actual de-
[10] livery of a part being said to be impossible (*p*).

This, however, should be understood with some limitation: for if a part-owner has the *actual* possession of the ship, it is not impossible for him to deliver the possession: if he has not the actual possession, the possession, of the other part-owners may reasonably be considered to be the possession of the vendee after the sale. Indeed, in the case of an absolute sale, it can rarely happen in practice that the seller should continue in possession: but the rule extends also to mortgages of this species of property, and with regard to *them* has been often actually enforced (*q*). But when a ship is abroad, a perfect transfer of the property may at the Common Law be made by assignment of the Grand Bill of Sale, and delivery of that and the other documents relating to the ship (*r*), as the delivery of the key of a warehouse to the buyer of goods contained

(*n*) By virtue of the *Stat.* 21. *James* 1. *c.* 19.

(*o*) By the Common Law, and the *Statute* 13. *Eliz. c.* 5.

(*p*) *Addis v. Baker and others*, 1 Anst. 222. See also *Gillespie v. Coutts*, Ambler, 652.

(*q*) *Stephen v. Sole*, cited in 1 Ves. 352. and in 1 Atkins, 157. *Hall v. Gurney* Co. Bank. Laws, *ch.* 8 *s.* 11. *Falkner v. Case*, 1. Bro. *Ch. Ca.* 125, and more at length, 2 Ter. Rep. in B. R. 491.

(*r*) *Ex parte Matthews*, 2 Ves. 272. and *Atkinson v. Maling*, 2 Ter. Rep. in K. B. 462. *Ex parte Batson*, Co. Bank. Laws, *ch.* 8. *s* 11. 3 Bro. *Ch. Ca.* 362, and per *Kenyon* Ch. J. *arguendo* in *Gordon v. E. I. Company.* 7 Ter. Rep. in K. B. 234.

therein is held to change the property of the goods, according to the rule of the Civil Law (*s*); such delivery in each case being not merely a symbol, but the mode of enabling the buyer to take actual possession, as soon as circumstances will permit. And the legislature has recognized this mode of transfer, and intro- [11] duced particular regulations respecting it, as will be noticed in the following chapter. And to this purpose, in the case of *Batson* before referred to,* *Dublin* was esteemed a foreign port with respect to a ship belonging to owners resident in *England*, and mortgaged there. In such a case, however, the buyer or mortgagee should not delay to take possession of the ship upon its return to this country.

6. The law of England, which in all its branches favours the transmutation of property made without fraud, as considering such transmutation beneficial to commerce, differs in this particular very materially from the law of *France;* for, by the (*t*) *French* ordinance, all ships remain subject to the debts of the seller, until they have made one voyage at sea, under the name and at the risk of the new purchaser, unless they have been sold under a decree; and the sale of a ship at sea shall never prejudice the creditors of the seller. And *Valin*, in his commentary on this part of the ordinance, says, that the debts here meant are debts of every description due at the time of the sale: and in another place (*u*) he informs us, that according to the general law of *France*, ships like other moveables cannot be hypothecated; and that in those parts of *France* where the hypothecation

(*s*) *Dig.* 41. 1. 9. 6.
(*t*) Liv. 2. Tit. 10. *Des Navires.* art. 2. & 3.
(*u*) Comment: on the *French Ordinance*, tom. 1. p. 340.

* Ante. 10. note (*r*).

of moveables is permitted, the hypothecation con-
[12] tinues in force only during the possession of the debtor himself, and does not enable the creditor to follow the property into the hands of a third person. It should be observed, that in the case of hypothecation, according to the strict meaning of that word in the Civil Law (*x*), the debtor always continues in possession of the thing hypothecated.

7. Another mode of acquiring property in a ship is by capture from an enemy in time of war, legalized and sanctioned by a sentence of condemnation in a Court of the capturing power, constituted according to the law of nations. In this case, however, if the capture is made by a ship belonging to his Majesty, the prize is formally condemned to the King, and the value distributed among the captors; and if the capture is made by a private ship, in which case the sentence is in form a condemnation to the captors, a sale will always be the most convenient mode of ascertaining the value, both for the purpose of distribution among the captors, and of payment of the (*y*) duties to the King; and the Acts of Parliament which give to prizes the privileges of British ships, presume a sale thereof, and provide regulations accordingly, as will appear in the next chapter. [13]

8. Capture by *pirates*, who are merely robbers at sea (*z*), does not divest the property of the owner; and in a very early period of our history a law was made for the restitution of property so taken, if found

(*x*) Dig. 13. 7. 9. 2. Proprie pignus dicimus, quid ad creditorem transit; hypothecam, cum non transit, nec possessio ad creditorem.

(*y*) By 34 *Geo.* 3. c. 70. ships of war, whether public or private, captured and made prize, are exempt from duty.

(*z*) 27 *Edw.* 3. stat. 2 c. 13. Year Book 2 Rich. 3. 2 *Jenkin's Cent.* p. 165.

within the realm, belonging as well to strangers as Englishmen. But capture by an enemy, in the exercise of war between two nations, does, according to the law of nations, wholly divest the property of the owner, and transfer it to the captor or the sovereign of his state at *some* period(*a*). The *African* States, having now acquired the character of established governments, and having regular treaties with this country, are not at present considered as pirates. And therefore in the case of a British ship captured by the *Algerines*, and sold under the authority of the Dey of Algiers, before the *Spanish* Consul, to a merchant of *Minorca*, who transferred it to a British merchant under the sanction of the Judge of the Vice-Admiralty Court at *Minorca*, the Court of Admiralty here refused to award restitution to the original owner(*b*).

9. There appears, however, to be no settled and uniform rule established in practice among nations, as to the precise period, at which property is divested [14] by capture. By some writers, and in some nations, this has been held to take place after a possession of twenty-four hours; by others not until the prize has been carried *infra præsidia* (*c*), an expression of very doubtful meaning as applied to maritime warfare.

The present very learned Judge of the Court of Admiralty has said, that, in his apprehension, "by the "general practice of the law of nations, a sentence of "condemnation is at present deemed generally necessa- "ry, and that a neutral purchaser in Europe during war

(*a*) *Hale's* Treatise in three parts, par. 2. ch. 28. in *Hargrave*'s Law Tracts, p. 246. *Goss v. Withers*, 2 Burr. 683. 1 Rob. A. R. 59. *Marshall* on Insurance, p. 427.

(*b*) The HELENA, *Heslop*. 4 Rob. A. R. 3.

(*c*) *March*. 110.

"looks to the legal sentence of condemnation as one "of the title deeds of a ship, if he buys a prize ves- "sel (*d*)." Such a sentence was thought necessary in this country to divest the title of the original owner, and give a valid title to a purchaser under captors, more than a century ago: and a ship taken from an Englishman by a *French* squadron in the year 1691, and sent into *Bergen* in *Norway*, and there sold, coming afterwards into this country, was claimed by the original owner, and decreed to be restored to him by a sentence of the Court of Admiralty, affirmed afterwards upon appeal to the delegates (*e*). And upon the ground, that a legal sentence of condemnation cannot, according to the law of nations, be pronounced by a consul or minister of the belligerent power, in the country of a neutral power, to which the prize may have been [15] taken; ships have lately been restored by the judgment of the Court of Admiralty to their original owners, as well upon recapture from the purchaser (*f*), as upon arrest in a port of this country (*g*). In one case, the ship, while in the hands of a neutral purchaser, had been taken by the *French*, and carried into a *Spanish* port, and there condemned by the *French* consul as prize, but that condemnation had been reversed on appeal to the superior prize court at *Paris*, and the ship restored to the purchaser. These facts, however, were held not to alter the case, or give validity to the title of the purchaser. According to the principle, upon which these decisions are founded, a ship carried into a neu-

(*d*) 1 Rob. A. R. 139.

(*e*) The ship CONSTANT-MARY, 3 Rob. A. R 97. *note. Thermolin v. Sands*, Carth. 423.

(*f*) The FLAD-OYEN, *Martinson*, 1 Rob. A. R. 135.

(*g*) The KIERLIGHETT, *Spoerewig*, 3 Rob. A. R. 96. And the PROSPEROUS, Dec. 1800. See also *Havelock v. Rockwood*, 8 Term Rep. in B. R. 268. Where this principle is adopted.

tral port ought not, while remaining there, to be condemned in the country of the captors; but as it appeared in a late case (*h*) in the Court of Admiralty, that sentences of condemnation under such circumstances had been sometimes passed in this country, the learned Judge of that Court refused to restore a *British* ship carried into *Norway* by a *Dutch* privateer, and [16] condemned by a Court at the *Hague*. But states in alliance with the captors and at war with the country to which a captured ship belongs, are considered as forming one community with the captors: and a prize carried into such a state may be legally condemned, either there by a consul belonging to the nation of the captors (*i*), or in the country of the captors (*k*). (1)

10. The subject of restitution on recapture will be mentioned in the chapter on Salvage.*

(*h*) The HENRICK and MARIA, *Baar*, 4 Rob. A. R. 43. A short time before this case was argued, the same learned Judge having condemned a *Dutch* ship, but afterwards discovered that although she was described as lying at *Plymouth*, she was in truth in *Norway*, directed the Registrar to annul the decree. Note to the case of the HERSTELDER, 1 Rob. A. R. 119. (2)

(*i*) The BETSEY, *Kruger*, 2 Rob. A. R. 210. note; and *Oddy v. Bovil*, 2 East. 473.

(*k*) The CHRISTOPHER, *Slyboom*, 2 Rob. A. R. 209.

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(1) It seems to be the established law in the United States, that a condemnation is necessary to transfer the property in a prize. It was so held, as to neutrals, by *Johnson J.* in the Circuit Court of the U. S. for South Carolina, in Rose v. Himely, 4 Cranch. 508. Appx. who said, "I heartily concur in the opinion, that as far as between neutrals at least, a sentence of condemnation is indispensably necessary to produce a complete divesture of

(2) The case of the Henrick and Maria was affirmed by the court of appeal in 1807, expressly as Sir W. Grant said upon the ground that the acknowledged practice of Great Britain must have the effect of making those sentences valid whilst that practice continued. See also on the same ground the Comet. 5 Rob. 255.

* Post 398.

11. It seems proper in this place to take notice of the question, whether the mortgagee of a ship is to be deemed in law the owner of it, entitled to the benefits, and liable to the burthens, which belong to that character, before he takes possession of the ship.

The first decision, which I find in our books upon this subject is the case of (*l*) *Chinnery against Blackburne ;* which was an action brought for the freight of

(*l*) In K. B. East. Ter. 24 Geo. 3. Reported in a note. 1 *Hen. Black.* Rep. 117.

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property, and unless the neutral property captured be put in a train for adjudication, I should think a nation at liberty to seize it as piratically taken, for the capturing power is bound to satisfy the neutral nation, that she had a legal right to attack her citizens, and it will be found upon reflection, that this cannot be satisfactorily done in any other mode than by a decree of her tribunals of justice."—And the same doctrine seems to have been admitted by the Supreme Court of the U. S. in deciding the same case on the appeal. 4 Cranch. Rep. 241. And in Hudson, &c. v. Guestier, 4 Cranch. Rep. 293. the Court expressly say, that " the property in a neutral, captured as an enemy, is never changed until sentence of condemnation has passed."—In Wheelwright v. De Peyster, 1 John. Rep. 471. the Supreme Court of New York held, that the property in goods captured, cannot be transferred so as to divest the right of the original owner, unless by a sentence of condemnation by a Court of competent jurisdiction.—See also an ordinance of Congress in 1781, on this subject, 7 Journals of Congress, 68. 189. and Miller, &c. v. Ship Resolution. 2 Dall. Rep. 1.

Every sentence of a court of a competent jurisdiction over the subject matter of its judgment, is conclusive as to the title to the thing claimed under it. 4 Cranch. Rep. 241. 293. See also Penhallow v. Doane, &c. 3 Dall. 54. and 1 John. Rep. 471.

goods from *Antigua* to *London*, and upon the trial whereof it was proved in evidence, that by an Indenture of Assignment, dated *January* 4, 1783, *Robert Merryfield*, in consideration of 1,166*l.* 18*s.* which he owed to the plaintiff, assigned to her the ship B, &c. in which indenture there was a covenant from the plaintiff to re-assign the said ship, &c. to *Merry-* [17] *field* on payment of 1,166*l.*, with lawful interest, on or before the tenth of *November* then next ensuing; that at the time of the execution of the deed, the ship was

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But if a claim be set up under a sentence of condemnation of a foreign court, the courts of the U. S. will examine into the jurisdiction of the foreign court, and if its jurisdiction cannot consistently with the law of nations be exercised, the sentence will be disregarded. 4 Cranch. ibid. 1 John. Rep. ibid.—If therefore a vessel for a breach of municipal law be seized without the territorial jurisdiction of a nation; or if the sentence be pronounced after the possession of a vessel is lost by *recapture*, *escape*, or *voluntary discharge*, the condemnation is invalid. 4 Cranch. ibid.

It seems also established that a condemnation of a consul of a belligerent in a neutral country, is held invalid in the United States. In the above case of Wheelright v. Depeyster, the court held that belligerents cannot establish prize courts in a neutral country, nor can there make sale of their prizes unless authorized by treaty; that the courts of the sovereign of the captors are the only competent tribunals to decide on the validity of captures; and that prize courts proceed *in rem* and cannot adjudicate on a prize lying in a foreign neutral port, or out of the jurisdiction of the captor or his ally.

In Glass v. The Sloop Betsy, the Supreme Court of the U. S. decided, that no prize jurisdiction could be exercised in a neutral country, unless by treaty.

in the river *Thames*, and afterwards sailed to *Portsmouth*, and continued there till the middle of *March* following in the possession and under the command of A. B., and that the plaintiff did not then take possession: that *Merryfield* navigated, victualled, and manned the ship as owner thereof, at his own expense and risk, both from *England* to *Antigua*, and on her return from thence. That *Merryfield* at *Antigua* gave the command of her to one *Drysdale*, and sent her to *England*, with orders to *Drysdale* to address himself to Messrs. *Dunlop* of

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But as to the validity of a condemnation, when the prize lies in a neutral port, the Supreme Court of the U. S. have differed from the case of Wheelwright v. De Peyster. For after very full argument in Hudson, &c. v. Guestier above cited, they held that, possession of the sovereign of the captors gives jurisdiction to his courts; that a ship, when carried into a neutral port, must be considered as still in his possession; that his possession could not be lawfully devested by the tribunals of that neutral country, into whose port the ship should be brought, and therefore that a condemnation of a ship so situated might be adjudged by the courts of the sovereign of the captors, and was binding upon all the world, even though the condemnation was for a breach of mere municipal law, and not for a violation of the law of nations. From this decision however Chase J. and Livingston J. dissented, and in this case as well as the case of Rose v. Himely above cited, denied that a condemnation of a ship while lying in a neutral port could be valid. In the latter case, which was of a condemnation of an American ship in a court at St. Domingo, while with the consent of the captors, she was lying in the United States, Cushing J. concurred with them. And see on the general question Duncanson v. M'Lure. 4 Dall. Rep. 308.

London, merchants, who were to sell her according to the directions contained in a letter, in which letter *Merryfield* also mentioned that the plaintiff had a demand against him for near 1,200*l.* sterling, which he hoped to remit shortly; that Messrs. *Dunlop* being applied to as consignees, lent two sums of 50*l.* to *Drysdale* the master, declaring that they should consider him as responsible, in case they should not receive the same by

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In cases of captures many questions have arisen on suits against the captors for restitution in our courts, where the process has been sometimes *in personam*, and sometimes *in rem*. In such cases where there has been a sentence of condemnation by a court of competent jurisdiction over the subject matter, it has been uniformly held, as before stated, that the sentence was conclusive upon the title. And where a libel was filed in the District Court of the U. S. for damages against the captors for the capture on the high seas of a vessel alleged to be neutral, which vessel was carried *infra præsidia* of the capturing power, the Supreme Court of the U. S. awarded a prohibition to the District Court; and held that the trial of ships captured as prize without the jurisdiction of any particular state belonged exclusively to the courts of the captors, if the ships so captured be brought within the dominions and jurisdiction of the capturing power, and that all questions incident thereto are exclusively cognizable in the same courts, and cannot be enquired into by any other court or tribunal, nor are the captors amenable to any other courts, nor liable to be arrested for such capture as prize, whether the ship captured be belligerent or neutral.—U. S. v. Richard Peters, District Judge. 3 Dall. Rep. 121. —S. P. Talbot v. Janson. 3 Dall. Rep. 133.—But *where the ship is brought into the ports of the U. S.*, the courts here will take cognizance of the capture, and if the capture has been made *without a lawful commission*, they will decree restitution. Talbot

freight, &c. and that they afterwards received the money from *Drysdale:* that the ship completed the delivery of the cargo on the 27th of *September*, 1783: that the plaintiff took possession on the 29th of *September* following, immediately on receiving information of her arrival in the *Thames*, that the *defendant had* [18] *goods from Antigua on board, the freight of which amounted to 76l. 9s. 11d. for the recovery of*

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v. Janson. ibid.—See also Glass v. Sloop Betsy. 3 Dall. Rep. 6. So if the capturing vessel has been *illegally equipped* as a vessel of war in the U. S.—Semble. Geyer v. Michel, &c. and ship Den Onrekeren. 3 Dall. Rep. 285. and note under page 288.—Moodie v. Ship Alfred. 3 Dall. Rep. 307.—Moodie v. Ship Phebe Ann. 3 Dall. Rep. 319. So if the ship has been captured *within our territorial jurisdiction.*—Semble. ibid. and see also the reasoning in Rose v. Himely, and Hudson, &c. v. Guestier above cited, and the opinion of Johnson J. in the same cases, and in the Appendix to 4 Cranch. Rep. 508. So if a ship be captured on the high seas for a breach of mere municipal law.—See the same cases.—But neutral nations have no right to enquire into the legality of captures as between belligerents. M'Donough v. Dannery and the ship Mary Ford. 3 Dall. Rep. 188. Nor of captures of neutrals on the high seas; nor of captures within the territorial limits of the captors, whether in the exercise of belligerent or municipal rights.—See the preceding cases, and particularly the cases in 3 Dall. Rep. and 4 Cranch. Rep. above cited.—But in Findley, &c. v. Ship William. Peters' Rep. 12. and Moxen, &c. v. Brig Fanny. ibid. 309. where the capture was made within our territorial jurisdiction, the District Court of Pennsylvania dismissed the libels for restitution. However by Act of Congress, 5 June 1794. 3 vol. ch. 50. sec. 6. p. 91. the District Court is authorized to take cognizance of all captures within a marine league of our shores.

which the action was brought: that *Drysdale* the master paid for lights, custom house dues, and for clearing the ship, which the plaintiff repaid him, and she also paid his and the mariners wages, for the voyage from *Antigua*, to the amount of 234*l.* 7*s.* 7*d.* after she took possession of the ship: and that the plaintiff afterwards sold the ship by auction for 710*l.*

Upon this state of facts the question for the opinion of the Court of King's Bench was, whether the plaintiff, the mortgagee of the ship, was entitled to receive the freight earned by the ship after the date of the mortgage, and before the plaintiff had taken possession of the ship, and while the mortgagor had acted as owner and employer of the ship: the merchant not appearing to have any counter-claim or demand upon the mortgagor, which would have furnished a defence to an action for the freight at his suit. And the Court of King's Bench decided that the plaintiff was not entitled to the freight under these circumstances: they considered the contract for the carriage of the goods, upon which the demand arose, to have been made with the mortgagor on his own account, and not as an agent for the mortgagee; and Lord *Mansfield* said, "till the mortgagee takes "possession, the mortgagor is owner to all the world, "and he is to reap the profits." And Mr. *Justice Buller* said, "If the mortgagor be considered as agent, "he must be so throughout, and then the mortga- "gee would be answerable for every loss, dam- [19] "age, &c." And it was observed that the payments, which the plaintiff had made to the master, &c. were voluntary payments to get possession of the ship free from any lien.

12. It seems, that the learned Judges, by whom this case was decided, were of opinion, that a mortgagee,

who had not taken possession, would not be liable for such repairs or other expenses, as are not a charge upon the ship itself in specie. And so the law was afterwards held to be, in the case of (*m*) *Jackson against Vernon*, by Mr. *Justice Heath* and Mr. *Justice Wilson*, the only judges present in the Court of Common Pleas, at the decision of that case. It was an action for the price of ropes, cordage, and other stores furnished in this country to a ship, by the order of one *Palmer*, between the date of a mortgage of the ship executed by him to the defendant, and the time when the defendant took possession of the ship in pursuance of the mortgage.

13. In the determination of this case of *Jackson against Vernon*, some reliance was placed on a case (*n*),
[20] decided in the Court of King's Bench, with respect to real property, in which it was held that a person, to whom a term for years had been assigned by way of mortgage, but who had not taken possession of the premises, was not liable to pay the rent reserved upon a lease, by which the term was created. The propriety however of this decision, with respect to real property, has been since doubted; and it seems evident, from the judgment pronounced by Lord *Kenyon*, the late very learned Chief Justice of the King's Bench, in the case of *Westerdell against Dale* (*o*), that his Lordship considered the mortgagee of a term of

(*m*) *Jackson v. Vernon*, 1 Hen. Blac. 114.

(*n*) *Eaton v. Jaques*, Doug. 454. In a case of *Stone v. Evans*, tried before *Lord Kenyon*, C. J. at the Westm. Sit. after M. T. 39 Geo. 3. in which the question was, whether the assignee of leasehold premises was liable for the ground rent? his Lordship explicitly declared, that he could not subscribe to the doctrine laid down in *Eaton v. Jaques*; it was proved, however, that the mortgagee had taken actual possession. The difficulty in real property may always be avoided by taking an under-lease, instead of an assignment.

(*o*) 7 Ter. Rep. in K. B. 306.

years to be liable to the rent reserved, and the mortgagee of a ship to be liable to the repairs; although his Lordship, and the other Judges, declined to give a positive opinion on these points, because the determination of them was not necessary to the decision of that cause.

14. Upon a subject, on which persons of such exalted rank and eminent talents have differed in opinion, it would be presumptuous in the author of this treatise to offer an opinion of his own. It may be remarked, however, that neither of the cases before-mentioned seems to afford an authority upon the general and abstract question of the right or obligation of the mortgagee; for in the first the mortgagor himself at *Antigua* acted personally in the management of the ship [21] as owner; in the last, the mortgagor himself ordered the repairs, and therefore the credit might not unreasonably be deemed in law to have been given, as in fact is certainly was, *to him*, and not to the mortgagee. The general question will most properly arise in the case of a contract made by the master in that character. And by way of advice and caution, I may with propriety say, that every person, who takes a mortgage of a ship, must, until these points shall have received a more solemn determination, consider it to be possible at least that he may expose himself to a loss by the very act from which he expects a security(1).

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(1) In the case of Hodgdon v. Butts, 3 Cranch, Rep. 140. the question of the liability of a mortgagee was argued, but not decided by the court. In that case, A. and B. bargained and sold to the plaintiff by deed, the Schooner Mississippi. then lying in Alexandria, and the cargo of the ship Hannah, then at

15. In this chapter it is proper also to mention another point, upon which different judgments have been pronounced, namely, *who*, in the case of a ship chartered to one person, is to be considered as owner with respect to another person, whose goods have been shipped under the authority of the charterer.

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sea, to indemnify the plaintiff for indorsement of notes to the amount of $10,000, and if A. and B. should indemnify the plaintiff in a certain time after the arrival of the schooner or ship from the voyage, which ever should first occur, then the deed should be void; and on failure to indemnify as aforesaid, the plaintiff was to be at liberty to sell the cargo of the ship and the schooner and cargo. In the same deed the said A. and B. bound themselves executors and administrators, and also the *freight and inward cargo* of the schooner, and the cargo of said ship to exonerate the plaintiffs; a memorandum of the mortgage (*as of the schooner*) was indorsed on the schooner's register, and delivered to the defendant, who was the master of the schooner, and who sailed from Alexandria to New Orleans, and from thence to Jamaica, and from thence returned to Alexandria. On the return of the schooner, and not before, she was put into the actual possession of the plaintiff under a new and absolute bill of sale executed at that time by A. and B. The defendant received the freight from New Orleans to Jamaica. It appeared in evidence that the instructions for the voyage were given by A. and B., and the whole was conducted under their management. At the commencement of it the said A. and B. were indebted in a considerable sum to the defendant for wages and disbursements in a prior voyage, which, and another sum the defendant was directed to discharge out of the accruing freight by one of the partners. After the voyage was ended, and before possession was delivered to the plaintiff, the defendant settled with A. and B. and deducted the sums aforesaid in his ac-

16. In the case of *Parish against Crawford* (*p*), an action was brought against the defendant as owner of a ship, upon a promise alleged to have been made by him to the plaintiff to convey in his ship a quantity of moidores from *London* to *Barbadoes*, which had not been delivered there. The facts of the case [22] were, that the defendant, the owner, had chartered the ship to one *Fletcher* for the voyage in question for a certain sum, and *Fletcher* was to have the freight of goods, but the freight of passengers was reserved to the defendant; and the defendant appointed the master, and covenanted with *Fletcher* for the condition of the ship and behaviour of the master. *Fletcher* took on board the moidores and other goods of the

(*p*) Shortly reported in 2 Stra. 1251. The account of the case here given is taken from a manuscript note much fuller than the report.

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count. After the plaintiff had received possession of the schooner, he paid the expenses and disbursements of the voyage by the orders of the defendant; but never gave any notice to the defendant that he should look to him for the freight until afterwards. The action was brought to recover the freight, or the disbursements paid. On these facts the Circuit Court of Columbia were of opinion that the plaintiff was not entitled to recover. And on error to the Supreme Court, the cause went off upon another ground. But the court said, "that it did not appear that the plaintiff had paid the disbursements in the "confidence of receiving the freight, *or that he was not compellable to pay them as owner of the vessel.* The freight had "previously been applied by the defendant under the authority of A. and B. to the payment of a debt due to himself. He "had a right, as a general creditor, to retain that freight as "against the original owners or their assignee."

plaintiff and other persons, and received the freight for them. For the defendant it was objected, that although the ship was his property, yet he was not owner in such a manner as to be liable to this action, but that *Fletcher* was for this purpose the owner. *Chief Justice Lee*, however, before whom the cause was tried, was of opinion that the action might be maintained; and the plaintiff recovered damages to the value of the ship and freight (*q*). The sentiments delivered on this occasion by the Chief Justice were as follows: "The true consideration is, whether by any thing done by *Crawford*, "who is confessedly the owner of the vessel, in chartering it to *Fletcher*, he has discharged himself as owner? *Crawford* considers himself as the governor of "the ship, and so covenants for the government of it, "during the voyage, and the ship was navigated by *his* "master. Upon what foundation then is an owner "chargeable, but upon these two considerations? *First*, "The benefit arising from the ship, which is "the equitable motive. *Secondly*, The hav- [23] "ing the direction of the persons who navigate it. And it is upon these two things taken together, that the implied contract arises. Though "*Crawford* has not that freight, which the merchants "pay for their goods, yet as he has the benefit of the "freight in general, he has that equitable motive which "makes him liable. With regard to *Fletcher*, what "*Crawford* has done is only giving him a power to put "goods on board. And it seems to me, the makers of "the act of parliament could not have any notion of "such an owner of the ship, for it speaks generally of

(*q*) 12 *Geo.* 2. *c.* 15. A statute which limits the responsibility of the owners. See Part the *Third*, Chap. 5.

"owners of ships; but this *Fletcher* is not to be consid-
"ered as owner of the ship in any light, but only as
"having a power to make use of it in this way. If this
"was to be considered in the nature of a mortgage, it
"would be delivering up the ship for such time as the
"mortgage should be in force. Therefore I think there
"is nothing appearing upon this evidence, that dis-
"charges *Crawford* as the owner of the ship."

17. But the force of the decision in this case of *Parish against Crawford*, appears to be weakened by a more recent determination. In the case of *James against Jones & others* (r), an action was brought
[24] against the defendants as owners of the ship *Sea-Flower* for the loss of a quantity of raisins on a voyage from *Faro* to *London*. One *Thomas*, the master of the ship, had, in his own name as master, and in the absence of the owners, chartered the ship to *Reed* and *Parkinson* on a voyage from *Falmouth* to *Faro* and back to *London*; and *Reed* and *Parkinson* engaged by the charter-party to provide a full lading from *Faro*, and to pay a stipulated price per ton. The goods in question were shipped at *Faro*, by the consent of the agent of *Reed* and *Parkinson* at that place, and *Thomas*, the master, signed a bill of lading, engaging to deliver them to the plaintiff, "he paying freight per charter-
"party." These facts appearing at the trial of the cause before Lord *Kenyon*, his Lordship was of opinion, that *Reed* and *Parkinson* were, with respect to the plaintiff, the owners of the ship *pro hâc vice*; that the defendants, *Jones & others*, were not responsible to him, and consequently that the plaintiff could not maintain

(r) *James v. Jones and others*, Guildhall Sit. after Trin. Term, 39 *Geo. 3*. There is a short note of this case in *Espinasse's* Nisi Prius cases, Vol. iii. p. 27.

his action. Under this opinion the plaintiff and his counsel acquiesced, and did not apply to the Court for a further consideration of the subject. But the before-mentioned case of *Parish against Cranford*, does not seem to have been adverted to on this occasion. The question, however, in each case, appears rather to have been a matter of form than of substance; for it seems clear, that the owners were in each case liable to an action at the suit of the person, to whom the ship was chartered, and who might have sued and [25] recovered damages for the benefit of the merchant, whose goods were lost.*

The opinion of the Chief Justice, in the case of *James against Jones*, is conformable to the principle of a judgment pronounced by the Court of King's Bench in a former case (*s*) on a question of Insurance, wherein it was decided, that a deviation committed by the master with the knowledge of the absolute owner, and which therefore could not, according to the law of *England*, be an act of Barratry with respect *to him*, was an act of Barratry with respect to a third person, who had hired the ship by a charter-party, and who was considered as owner for the particular voyage, with relation to the subject of that cause (1).

(*s*) *Vallejo v. Wheeler*, Cowp. 143.

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(1) The question as to ownership on charter-parties, has been also litigated in our courts. In a case where by a charter-party A. let to B. for a certain voyage *the whole tonnage* of his brig and covenanted to deliver the cargo at the port of destination, dangers of the seas excepted, and also that the brig should be tight and strong, and properly manned for the voyage, and the

* See Post. 116. Sect. 5.

CHAPTER THE SECOND.

OF PROPERTY IN BRITISH SHIPS.

1. ALL commercial nations have, for the advancement of their individual prosperity, conferred various privileges of trade upon the ships belonging to their own countrymen; and the Legislature of this nation has for the same purpose, at different periods, enacted laws suitable to the circumstances of the times, requiring for the exercise of some particular branches of com-

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return cargo should be delivered to B. at the home port; and afterwards, by provisional articles between the parties, it was agreed that the captain should be instructed by the owner to touch at Falmouth, and "there to lay off and on 24 hours or "longer if desired, in day light, during which time there "will come off orders from Mr. C., Mr. D. or Mess. E. & Co.;" and the captain was to proceed to such port (of five specified ports) as their orders should state; and if "the vessel was de-"tained over 24 hours at Falmouth, demurrage should be paid "for the time at the rate stipulated in the charter-party."—The vessel proceeded to Falmouth,and there, no orders being ready, the brig by the advice and orders of Mr. C. came into the port instead of laying off and on, and was there seized and detained 80 days, on an action of covenant for demurrage, alleging a breach that by the orders of C. the brig was conveyed into the port of Falmouth, and by means thereof was detained 80 days; it was held by the Supreme Court of the U. S. *that A. still continued owner for the voyage;* that the covenant to touch at Falmouth and lay off and on, &c. was his covenant as owner; that

merce, ships not only of the property of its own subjects, but also of the built of its own dominions; allowing other branches to ships the property only of its own subjects, without regard to the built; and, in others, in which foreign ships were suffered to participate, favouring those of its own subjects by a difference in the rate of duties. It has, however, at all times, been the policy of the Legislature, to confine the privileges of our trade, as far as was consistent with the extent of it, to ships built

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if the going into Falmouth was a breach of the articles, no action would lie for A., but if any lay, it would be for B.; but as the master in this action acted by the orders of the agent of B., B. was not entitled to maintain any. That of course no demurrage was due in this case, as the detention was occasioned, either by the misconduct of the master for which A. was answerable, or was for the purpose of avoiding danger, and was not occasioned by laying off and on the port of Falmouth, or by any misconduct of B., which were the only cases in which B. would be liable on the true construction of the charter-party. Hool, &c. v. Groverman, 1 Cranch. Rep. 215.

In an action on a policy on a vessel called the Marcus, the plaintiff declared for loss by barratry of the master under the following circumstances. The plaintiff was owner of the Marcus, and by charter-party dated 13 June, 1801, chartered the same to Aken and Brice, and in the charter-party, excepted one half of the cabin, the privilege for 20 barrels for the master and mate, and so much of the hold and forecastle as was necessary for the accommodation of the master and crew, provisions, &c.; and covenanted to have the vessel ready and to receive along side such cargo, contraband goods excepted, as Aken and Brice should tender and the vessel could conveniently carry, and to proceed on the voyage described, and that master and crew should assist in landing the cargo; and the plaintiff was also to

within the King's dominions; but it was reserved for the present reign to behold the ship-building of the country advanced to such a state as to warrant the confinement of these privileges exclusively to ships of that description, or taken as prize in war. And, accordingly this measure was carried into execution [27] by a statute (*a*), made in the 26th year of his present Majesty's reign; reserving, however, to such foreign

(*a*) 26 *Geo.* 3 *c.* 60.

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hire the master and crew and pay all their wages and expenses for the voyage. The charter-party contained the usual covenants on the part of Aken and Brice, as to providing the cargo and demurrage, and the whole of the freight was to be paid at New York on the delivery of the return cargo.—Brice went the voyage in the vessel and acted as supercargo, and the master, at the request of Brice, deviated from his voyage and went to another port. The question was whether the plaintiff was the owner of the vessel for the voyage, or Aken and Brice. The court were of opinion that the plaintiff continued the owner of the vessel for the voyage, and that the deviation amounted to an act of barratry in the master for which the assurers were liable. And the court thought the distinction to be, "that where by the "terms of the charter the ship-owner appoints the master and "mariners and retains the management and control of the ves- "sel, the charter is rather to be considered as a covenant to "carry goods; but where the whole management is given to "the freighter, it is more properly a hiring of the vessel for "the voyage, and in such case the hirer would be deemed "owner." M'Intire v. Brown. 1 John. New York Rep. 229.

And where one part-owner hired of the other his moiety, a ship for 18 months for a monthly hire, and in the charter-party it was agreed between them *that* in case of the loss of the

built ships, as were *then* the property of his subjects, the privileges to which they were then entitled by the existing laws. For the more effectual execution of this important measure of public policy, various new regulations were at the same time introduced, to ascertain the built and property of ships, which have been since improved by subsequent statutes (*b*), as experience

(*b*) 27 *Geo.* 3. *c.* 19. 34 *Geo.* 3. *c.* 42 & 68. 35 *Geo.* 3. *c.* 58. 37 *Geo.* 3. *c.* 63.

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schooner during the term that the hirer should pay the other party $1800, besides arrears of hire, and for better security should cause an insurance to be made on the ship for $3000—a policy was underwritten and an action brought for a loss; the Supreme Court of Massachusetts held that by the contract the hirer had a special property in the other moiety which was at his risk during the term, and that when the ship was lost, he lost the whole of her. Oliver v. Green. 3 Mass. Rep. 133.

In Mason, &c. v. Ship Blaireau. 2 Cranch's Rep. 240. the Supreme Court of the U. S. held that the owners of a ship chartered for a voyage, still continue owners for the purpose of receiving salvage in case of property saved by her crew; and that though one of the charterers be on board, and consent that a part of the crew should navigate the saved vessel, this is not such an act as puts the ship at the risk of the charterers.

An action was brought against certain persons as owners of a ship for running down the ship of the plaintiffs. At the trial it appeared that the ship of the defendants was at the time under charter to the Commissioners of the navy, who had put on board a commander in the navy, who had then the command of the ship. The charter-party contained covenants on the part of the defendants, that they would provide a crew for the ship, and pay and victual them: that they would repair the ship and

shewed that some particulars, notwithstanding the great attention paid to the original statute, and the great talents employed in framing it, had not been sufficiently provided for by it. An enumeration of the commercial privileges of British ships would be wholly foreign to the subject of this book. The provisions introduced by the Legislature to ascertain the property, and regulate the mode of transferring it from one person to another, are peculiarly within its province; and I shall therefore

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supply her with stores; but the guns and ammunition were to be found by government; that the master should obey the orders and instructions of the naval officer; on the part of the commissioners, that they would pay 15*s.* 5*d.* per ton per month, and 5*l.* 10*s.* per month for each man of the ship's complement; that if the ship should be sunk, taken or burnt by the enemy without default, government should pay for her, and should also pay the freight then due to her; that government should also pay for all damages that should be sustained in any action with the enemy. On this case the Court of Common Pleas gave judgment for the plaintiffs and said, notwithstanding the charter-party the ship belonged to the defendants. It was navigated by a master and sailors provided and paid by them, and it is difficult to say that it is not to be considered as their ship with regard to all the world, except the commissioners of the navy. The taking an officer on board belonging to those to whom they have let the ship, cannot exonerate them from their responsibility. Fletcher, &c. v. Braddick, &c. 2 New. Rep. 182.

So where a ship was chartered from New York to Jeremie and back to New York at a freight of $2,400 for the voyage, the court held that the charterer was not owner of the ship for the voyage, and could not issue the sum agreed to be paid by the name of "*freight*;" and that the charter-party was a mere

endeavour to arrange and consolidate them; treating the several statutes, in which they are found, as being substantially one, except where particular circumstances require another course. It should be observed, however of these provisions, that they are not less happily calculated to prevent the commission of private fraud upon individuals, than to advance the public policy of the state, by the notoriety of property obtained [28] through the medium of of a public Register, a meas-

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covenant to carry the goods. Cheriot v. Barker. 2 John. Rep. 346.

When an abandonment is made to insurers upon a ship, and is accepted by them, they become owners, and this ownership is to be computed from the time of the loss, on account of which the abandonment is made. Abandonment has this retrospective effect, and it amounts to a complete transfer of the property. United Insurance Company v. Robinson. 2 Cain. Rep. 280. 2 Emergion 194, 6.—Pothier Contrat d' Assurance, n. 138.—United Insurance Company v. Scott, &c. 1 John. Rep. 106. The insurers are consequently liable to pay for all repairs and necessary expenses incurred after the loss. ibid. and Reade. &c. v. Commercial Insurance Company. 3 John. Rep. 352.

The same is the effect on abandonment of a cargo. The insurers become immediately the owners, and are entitled to the property or the proceeds of it against all persons in possession of it. Schmidt v. United Insurance Company. 1 John. Rep. 249. Robinson, &c. v. The United Insurance Company. 1 John. Rep. 592.

And where the policy is underwritten by several persons, after abandonment made to them, they are not to be considered as joint partners, but are severally liable for their proportion of repairs. United Insurance Company v. Scott. 1 John. Rep. 106.

ure adopted with numerous improvements from the wisdom of former times(c). (1)

(c) The registering of ships appears to have been first introduced into practice in this country by the navigation act, 12 *Car.* 2. *c.* 18. *s.*10. A. D. 1660. For it is not mentioned in the navigation Ordinance in the time of the usurpation; but the *Statute of Charles the Second* only requires *foreign* ships *British owned* to be registered. The *Statute* 7 & 8 *W.* 3. *c.* 22. *s.* 17. requires *British* or Plantation built ships *British owned,* if intended to be employed in the Plantation trade, and also *prize* ships, to be registered. And ships, for which Mediterranean passes were wanted, were also registered in consequence of a regulation at the Admiralty, although a register was not required by Statute for *British ships* employed in the *Mediterranean* trade; as we learn from *Reeves'* History of the Law of shipping and Navigation, p. 423. *Lewis the Fourteenth,* by an *Ordinance* dated the 24th *October* 1681, required all his subjects to make a declaration in the Admiralty of their residence of all ships belonging to them, whether built in *France* or foreign countries, and of the names of the several part-owners, who were to be *Frenchmen* only, and resident in *France,* in order to preserve the privileges of the national flag to his own subjects. See *Valin* on the *French Ordinance,* tom. 1. 564. &c. The first article of the *Hanseatic Ordinance* of 1614, prohibits the building of ships in the *Hanse Towns* to all, except Citizens and persons having the particular permission of the Magistrates of the place. An Act of *Congress* of the 31st of *December* 1792, ch. 1. contains regulations for registering ships in the United States of *America,* the greater part of which correspond almost exactly with those of our *Statute of* 26 *Geo.* 3. *c.* 60. The national privileges of trade are confined to ships belonging to, and commanded by Citizens of *America,* and either built within the *United States,* or belonging to *American* Citizens on the 16th of *May* 1789, and continually thereafter; or taken and condemned as prize in war; or forfeited for a breach of the laws of the *United States.*

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(1) In this chapter the same order will be pursued in examining the corresponding sections of the registry acts of the United States in the notes. The United States were early impressed with the propriety of establishing commercial regulations for the encouragement of their own trade, and of conferring privileges upon ships built within the country. An act was passed the first of September, 1789, by Congress for this purpose, but being found inadequate it was repealed, and the act of 31 December, 1792. (2 U. S. L. 131) substituted in its stead. This act and the act of 18 February, 1793. (2 U. S L. 168) constitute the basis of the regulations for the foreign

2. The *subject* of these provisions are all merchant ships employed upon the sea, whether in the coasting trade or distant voyages (*d*), having a deck, or being of the burthen of *fifteen* tons and upwards; and either built in *Great Britain*, or *Ireland*, *Jersey*, [29] *Guernsey*, and the *Isle of Man*, or the *Colonies*,

(*d*) 26 *Geo.* 3. *c.* 60. *s.* 1. & 3.

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trade, and the coasting trade, and fisheries of the United States.

The acts of the United States relate to all Ships employed at sea, which may be divided into five classes: 1. Ships of the United States employed in foreign trade, which are entitled to be *registered*. 2. Ships built in the United States, but owned wholly or partly by foreigners, which are entitled to be *recorded*. 3. Ships built out of the United States, but owned by citizens which are entitled to a *certificate of ownership*. 4. Ships of the United States employed in the coasting trade or fisheries, which are entitled to be *enrolled and licenced*. 5. Ships built out of the United States and owned by foreigners, which are considered alien vessels to all intents and purposes. See Slight v. Hartshome. &c. 2 John. Rep. 531.

Ships actually registered and ships duly qualified for carrying on the coasting trade and fisheries, or one of them, are alone denominated and deemed *Ships or Vessels of the United States*, entitled to the benefits and privileges appertaining to such ships or vessels—and they continue to enjoy the same no longer than they continue to be wholly owned and commanded by a citizen or citizens of the United States. Act, 31 December, 1792. ch. 1. 2 U. S. L. 131. Act, 18 February, 1793. ch. 8.—2 U. S. L. 168.

Ships or vessels built within the United States before or after the 4th of July, 1776, and belonging wholly to citizens of the U. S., or not built within the United States, but on the 16th of

Plantations, *Islands*, and *Territories*, under the dominion of his Majesty, in *Asia*, *Africa*, or *America*; or taken, in lawful war, and condemned as prize; with the exception of "vessels not exceeding *thirty* tons, and "not having a whole or fixed deck, and being employed "solely in the fishery on the banks or shores of *New-"foundland*, and of the parts adjacent, or on the banks "or shores of the provinces of *Quebec*, *Nova-Scotia*, or "*New-Brunswick*, adjacent to the *Gulph of St. Lawrence*,

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May, 1789, and continually thereafter belonging to citizens; and ships or vessels captured by citizens in war and condemned as prize, or seized and condemned for a breach of revenue laws and wholly belonging to citizens, may be registered; but are not required to be under any other penalty than not being ships of the United States. Act, 31 December, 1792. ch. 1. sect. 2. 2 U. S. Laws. 132. No citizen who usually resides in a foreign country, can during such residence, entitle himself to have registered a ship owned in whole or part by him, unless he be a consul or an agent or partner in some house of trade or partnership consisting of citizens actually carrying on trade within the United States. Act of 31 December, 1792. sect. 2. No ships can be registered, or if registered, can be entitled to the benefit thereof, if owned in whole or in part by any naturalized citizen residing for more than one year in the country from which he originated, or for more than two years in any foreign country, unless he be a consul or public agent. But such ships may be registered anew on a *bona fide* sale to any citizen resident within the U. S. Act, 27 March, 1804. ch. 52. sect. 1. 7 U. S. L. 146.

No ship built within the United States before the 16th of May 1789, and not then owned wholly or partly by a citizen, can be registered, even on a transfer to a citizen, unless by way of prize or forfeiture. Act, 31 December, 1792, sect. 2. And no registered ships, which shall be seized or captured, and con-

"and to the north of *Cape Canso*, or of the Islands "within the same, or in trading coastwise within the "said limits; which latter vessels are not liable to be "registered, nor to any hindrance or molestation for "not being registered (*e*)."

Such ships however, must *belong* (*f*) to some of his Majesty's subjects in *Great Britain, Ireland, Jersey, Guern-*

(*e*) 27 *Geo.* 3. *c.* 19. *s.* 8.
(*f*) 26 *Geo.* 3. *c.* 60. *s.* 1. & 3.

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demned by a foreign power, can be registered anew, except regained by purchase or otherwise by the original owner, at the time of capture or seizure, or by his executors or administrators, but such ship shall be deemed a *foreign vessel* though purchased or owned by any other citizen. Act, 27 June, 1797, ch. 5. sect. (4 U. S. L. 11.) Act, 27 March, 1804, ch. 52. sect. 2. 7 U. S. L. 147.

Ships entitled to be *recorded*, and entitled to the benefits of *recorded ships* in the United States, are ships or vessels built in the United States after the 15th of August, 1789, and belonging wholly or in part to foreigners. Act, 31 December, 1792. ch. 1. sect. 20. 2 U. S. L. 150.

Ships entitled to be *enrolled* are ships of 20 tons or upwards, possessing the same qualifications and requisites as are made necessary for registering ships, i. e. they must be built within the United States, and be owned wholly by citizens. If under 20 tons, they are entitled to *a licence*. No ships, unless, enrolled and licenced, are deemed ships of the United States, entitled to the privileges of ships employed in the coasting trade or fisheries. Act, 18 February, 1793, ch. 8. sect. 1. 2. 2 U. S. L. 168.—and if any not enrolled or licenced, are found engaged in the coasting or fisheries, they are subject to forfeiture if they have on board any foreign articles or distilled spirits, other than sea stores. ibid. sect. 8.

sey, or the *Isle of Man*, or some of the King's Colonies, Plantations, Islands, or Territories, in *Asia*, *Africa*, or *America* (*g*); but no subject, whose usual residence is in any country not under the dominion of his Majesty, is to be deemed a *British* subject for this purpose during such residence, unless he be a member of some *British* Factory, or agent for, or co-partner in, a house or co-partnership actually carrying on trade in *Great Britain* or *Ireland*.

[30] Ships so built and so owned, and prize ships so owned, are now alone required and authorized to be registered, and entitled to the privileges of *British* ships (*h*). All other ships, although owned by *British* subjects, are to be considered as alien ships (*i*).

3. And further, to prevent fraud in the building of ships, and to secure the performance of that work to his Majesty's subjects, no ship shall be deemed *British* built, or enjoy the privileges belonging to that character, *if re-built or repaired, in a foreign port at an expense exceeding fifteen shillings per ton*, unless such repairs shall be necessary by reason of extraordinary damage sustained during her absence from the King's dominions, and to enable her to perform her voyage, and return to the King's dominions in safety; and unless, before the repairs are made, the master shall report upon oath, or affirmation if a quaker, her condition, to the *British* consul, or chief *British* officer, if there be any on the spot, and cause her to be surveyed by two per-

(*g*) 26 *Geo.* 3. *c.* 60 *s.* 8.

(*h*) The *Stat.* 33 *Geo.* 3 *c.* 66. *s.* 45. expressly enacts, that *prize* ships legally condemned and duly registered, shall be deemed *British-built* ships, and entitled to the privileges thereof. But it seems that the same effect would have been attributed to the words used in the 26. *Geo.* 3.

(*i*) 27 *Geo.* 3. c. 19. *s.* 13.

sons to be approved of by him, and deliver to him in writing the particulars of the damage sustained; and verify upon oath, or affirmation, the particulars and amount of the repairs, and the necessity of them, for the reason and for the purpose before-men- [31] tioned; which such consul or officer is required to certify under his hand and seal; and if there be no such consul or officer resident at or near the place, then the survey is to be made by two persons to be approved of by two known *British* merchants resident at or near the place; and the master shall produce to them vouchers of the particulars and amount of the repairs, and their certificate shall be of the same effect as that of the consul or chief officer. And if a ship is repaired in a foreign port, the master shall, if required, make proof on oath, or by affirmation, of the nature and amount of the expense of the repairs, before the principal officer of the Customs, at the port within his Majesty's dominions, at which she shall first arrive; and if the expense shall *exceed fifteen shillings per ton*, and the master shall not deliver the certificate before-mentioned, the ship shall be deemed foreign built (*k*).(1)

4. It seems to have been the intention of the Legislature, to subject to forfeiture every ship required to be registered, which should *depart from port* without being registered; but it may be doubted whether the words

(*k*) 26 *Geo.* 3. *c.* 60. *s.* 2.

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(1) There is no provision in the acts of the United States corresponding with that referred to in this section, respecting repairs of a ship in foreign ports.

used in this clause of the statute will bear such a construction (*l*). (1)

5. The *place of registry* is, in general, the port from and to which the ship shall usually trade, or, [32] being a new ship, shall intend to trade, and at or near which the husband or acting owner or owners reside; but four of the Commissioners of the Customs in *England*, or three in *Scotland*, may, if they see fit, authorize the register to be made in a different port (*m*). And *prize* ships, condemned in *Guernsey*, *Jersey*, or the *Isle of Man*, must, in order to secure the duties, be registered either at *Southampton*, *Weymouth*, *Exeter*, *Plymouth*, *Falmouth*, *Liverpool*, or *Whitehaven* (*n*). (2)

(*l*) 26 *Geo.* 3. *c.* 60. *s.* 32. See *post.* sect. 23. of this chapter.

(*m*) *Geo.* 3. *c.* 60. *s.* 4 & 5.

(*n*) 26 *Geo.* 3. *c.* 60. *s.* 26. By this statute all ships then in existence, were required to be registered within a fixed time, and those already registered to be registered anew; but it seems unnecessary to notice the particular regulations on this head at this distance of time.

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(1) In the United States, no ships are *required* to be registered. But to entitle them to the privileges of ships of the U. S. they must be registered, and otherwise are deemed alien ships; as is before stated, ships engaged in the coasting trade or fisheries, are liable to forfeiture if they have foreign articles on board, unless they are *enrolled and licenced.* Act, 18 February, 1793. ch. 8. sect. 12.

(2) The place of registry in the United States is *in general* the *Collector's District*, in which shall be comprehended the *port* to which the ship shall belong at the time of her registry, which port shall be deemed to be that at, or nearest to which the owner, if there be but one or if more than one, the husband or acting and managing owner of the ship, usually resides, and

6. In order to *obtain a certificate* of registry in the case of a *new* ship, the person applying for it must produce a full and true account, under the hand of the builder, of the denomination of the ship, time and place of building, tonnage, and name of the first purchaser, and must make oath that the ship is the same as thus described by the builder (*o*). In the case of a *prize* ship, the owner must produce a certificate of the condemnation, under the hand and seal of the Judge of the Court, and an account in writing of all the particulars, contained in the form of the certificate of registry, made and subscribed by one or more skilful persons, to be appointed

(*o*) 26 *Geo* 3. *c*. 60. *s*. 20. & 21.

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the registry must be made by the collector of such district. Act, 31 December, 1792. ch. 1. sect. 3.

Where, however, a citizen of the U. S. purchases a ship entitled to be registered, and *the ship is in another district than* that where he usually resides, such ship may be registered by the Collector of the District, where the ship is at the time of the purchase, upon the purchaser's complying with the provisions of the law in common cases. And the usual oath or affirmation may be taken by the owner at his option, either before such Collector, or the Collector of his own district. But upon the ship's arriving within the district to which she belongs, the certificate of registry, granted to her, must be delivered up to the Collector thereof, who is to grant a new certificate in lieu of the first, upon compliance with the provisions of the law in common cases, and is to transmit the certificate delivered up to the collector who granted it. If the certificate be not delivered up, it becomes void, and the purchaser and the master incur a penalty of one hundred dollars; and the same penalties are inflicted for false swearing, as in common cases, ibid. sect. 11.

by the Court to survey the ship ; and must also make oath of the identity of the ship (*p*) : and if the prize has been condemned in the foreign colonies, [33] oath must be made of the sum, for which the ship was sold, and an account of that sum must be subjoined to the certificate, in order that the duties may be paid upon the ship's arrival in *Great Britain* (*q*) ; where indeed, during the last war, they were required to be paid, whether the ship had been sold or not, before the ship could be entitled to the privileges (*r*). And further, if the prize was a ship of war, the pre-emption of the ship, furniture, and stores, was to be offered to the principal officers

(*p*) 26 *Geo.* 3. *c.* 60. *s.* 25.
(*q*) 26 *Geo.* 3. *c.* 60. *s.* 20 & 21.
(r) 33. *Geo.* 3. *c.* 34. *s.* 10.

And if a ship entitled to be registered is purchased by an agent or attorney for or on account of a citizen of the U. S. such ship being in a district of the U. S. more than fifty miles distant, taking the nearest usual route by land from that comprehending the port to which such ship, by virtue of such purchase, and by force of the act, ought to be deemed to belong, the collector of the district, where the ship is, is to register the ship upon application of the agent or attorney, and his complying with the requisites of the law in common cases, except that in the oath or affirmation he must state that he is agent or attorney for the owner, and that he hath purchased the ship *bona fide* for the person whom he names as owner. If he swear falsely there is a forfeiture of the ship or of her value to be recovered of such agent or attorney. Upon the ship's arriving in the district to which she belongs, the certificate must be delivered up, and a new one granted in the same manner and under the same penalties as in the last preceding case. ibid. sect. 12.

and commissioners of the navy : and the pre-emption of the guns, arms, and ordnance stores, to the master-general and principal officers of the ordnance; and their certificate of the tender of them, and of their refusal to purchase, produced to the officers appointed to make registry (*s*).

And before the register is made, an *oath* must be taken and subscribed in the form set forth in the statutes. This oath in the case of private persons, is to be made by the owner, if only one ; if two owners, and both resident within twenty miles of the place of registry, by both ; if both or either resident at a greater distance, by one only : if more than two owners, by the greater part, not exceeding three, if resident within twenty miles ; [34] or by one, if all are resident at a greater distance (*t*) ; and if three or more, and three do not attend, oath must further be made that the absent are not resident within twenty miles, and have not wilfully absented themselves to avoid taking the oath, or are prevented by illness from attending (*u*). In the case of the *East India Company*, or other corporation, the oath is to be made by the secretary, or other officer authorized by the corporation (*x*). But as ships are sometimes built in *Newfoundland*, and in those parts of the Provinces of *Quebec*, *Nova Scotia*, and *New Brunswick*, adjacent to the Gulf of *Saint Lawrence*, and to the North of *Cape Canso*, on account of owners residing in his Majesty's European dominions, the oath may, in

(*s*) 37 *Geo.* 3. *c.* 109. *s.* 6. These provisions were temporary, and I do not find that they have been re-enacted since the commencement of hostilities in 1803.

(*t*) 26 *Geo.* 3. *c.* 60. *s.* 10.

(*u*) 26 *Geo.* 3. *c.* 60. *s.* 11. The statute only requires this in the case of *three* owners; but in practice, if one of two only attends, he makes oath to the same effect as to the absence of the other. See the form in *Westerdell v. Dale*, 7 Ter. Rep. in K. B. p. 306.

(*x*) 27 *Geo.* 3. *c.* 19. *s.* 5.

the absence of all the owners, be taken there by the husband or principal agent of the ship, and a certificate of register granted, to be in force until the ship's arrival at some port in the European dominions, where it may be registered on the oath of the owners; and then the certificate becomes void, and the ship is to be registered anew upon the oath of the owners, as in the case of ships built at home (*y*).

The *oath* to be thus made, contains the name and description of the vessel, the name of the master, and of every part-owner, with other particulars tending to prove them to be subjects of his Majesty by birth, denization, or naturalization; and concludes with a positive averment, that no *foreigner*, directly or indirectly, hath any share or interest in the ships (*z*). (1)

[35]

(*y*) 27 *Geo.* 3. *c.* 19. *s.* 9.
(*z*) 26 *Geo.* 3. *c.* 60. *s.* 10. & 27. *Geo.* 3. *c.* 19. *s.* 4.

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(1) In order to the registry of a ship in the United States, the act of 31 December, 1793, prescribes that an oath or affirmation must be taken and subscribed by the owner before the proper officer. This oath or affirmation among other things states, the place of residence and citizenship of the party applying; that he is sole owner, or if the fact be otherwise, the names of the other part-owners, their residence and citizenship and if such part owners be resident in a foreign country, that they are consuls or agents, or partners in a house consisting of citizens of the U. S. and trading within the U. S. It further states the name and burthen of the ship, the place where and the year when built; if built within the U. S. before the 16th of May, 1789, that she was then owned wholly or in part by citizens of the U. S.; if not built within the U. S. that she was

7. And, in order to obtain a true and accurate *description* of the ship, one or more persons appointed by the commissioners of the customs, or in the Islands, &c. by the commanders in chief, are to go on board, and examine, and admeasure the ship (*a*): and if it is necessary to take the admeasurement, while the ship is *afloat*, are to do so in the particular mode prescribed by the statutes (*b*). The register to be made, when all these previous steps have been taken, specifies the name,

(*a*) 26 *Geo.* 3. *c.* 60. *s.* 12 & 13. *ashore*, appears to be pointed out
(*b*) The mode of taking the by the *stat.* 13 *Geo.* 3. *c.* 74. *s.* 1. tonnage, when the ship can be laid

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on that day entirely owned by citizens of the U. S. and so continued to be owned ever since. If a prize, it further states that she was after the 31 March, 1793, captured by citizens of the U. S. and legally condemned; if forfeited for breach of the laws of the U. S. it states that she has been so adjudged, and in both cases an authenticated copy of the condemnation must be produced. It further states that the master is a citizen of the U. S. and whether by birth, naturalization or otherwise, and that no foreigner hath directly or indirectly any interest in the ship. In case the master be within the district at the time of the registry, he, and not the owner, makes oath to his citizenship. Act, 31 December, 1792, sect. 4.

In case a new ship is to be registered, it is necessary to produce a certificate under the hand of the master-carpenter, by whom or under whose direction she was built, testifying that she was built by him or under his direction, and specifying the place where, and the time when, and the person for whom built, and describing her built, number of decks and masts, length, breadth, depth, tonnage, and such other circumstances as are usually descriptive of the indentity of a ship; and such a certi-

occupation and residence of every owner; the name of the ship; the place to which she belongs; the name of the master; the time and place of the built, or capture, and date of condemnation; the name of the surveying officer; the number of decks and masts; the length, breadth, height between decks, or depth of the hold; tonnage; particular kind and manner of building; gallery, and kind of head, if there be any. And of this register, a certificate is to be granted by the collector or controller of the customs in *Great Britain* or
[36] the *Isle of Man*, or the governor, lieutenant-governor, or commander in chief, and principal

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ficate authorizes the removal of a new ship in ballast from the district where built, to another district in the same, or an adjoining state where the owner actually resides. Act, 31 December, 1792. sect. 8.

The oath or affirmation is taken before the collector or other officer authorized to make the registry. ibid. sect. 4. If there be two or more owners, it is to be taken by at least one of them, and the other owners, who are resident within the U. S. must transmit to the collector, who grants the certificate of registry, a like oath or affirmation within ninety days after the same is granted. ibid. sect. 4. 5. and the same may be taken by them, either before the same or any other collector, or a Judge of the Supreme or District Court of the U. S. or of a Superior Court of original jurisdiction of some one of the States. ibid sect. 5. If such oath or affirmation shall not be taken and transmitted within 90 days, the certificate of registry is forfeited and void. ibid. sect. 5.

officer of the revenue of the customs in *Jersey*, or *Guernsey*, or the foreign territories (*c*). (1)

8. But before the certificate of registry is delivered out, a *bond* must be executed by the master of the ship, and such of the owners as personally attend, before the person authorized to grant the certificate (*d*), or (*e*) before any other person, and at any other place, by per-

(*c*) 26 *Geo.* 3. *c.* 60. *s.* 8.
(*d*) 26 *Geo.* 3. *c.* 60. *s.* 15.
(*e*) 27 *Geo.* 3. *c.* 19 *s.* 6.

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(1) Before a ship can be registered in the U. S. she must be measured by a surveyor, or a person appointed by him, or by the collector, or a person appointed by him, when there is no surveyor, in the port where she is. The officer who measures the ship for the information of, and as a voucher to the person who makes the registry, shall grant a certificate specifying the built of the ship, her number of decks and masts, her length, breadth, depth, tonnage, and such other particulars as identify a ship, and that her name, and the place to which she belongs, are painted on her stern in the manner required by the act. This certificate is to be countersigned by the owner or by some other person who may attend the admeasurement on behalf of the owner, in testimony of its truth, and without this the certificate is invalid. This admeasurement need not be made upon any subsequent registry, unless the ship has undergone some alteration in burthen. Act, 31 December, 1792. sect. 6.

When the terms of the Act of the U. S. have been complied with, the collector is to make a record or registry of the ship, and grant an abstract, or certificate thereof in the particular form prescribed by law. This certificate states that in pursuance of the Act of Congress, the person applying for the register having taken the oath required by the act, (and it states the facts sworn to) and the surveyor having given his certificate

mission of the commissioners of the customs, or of the commander in chief of the European islands or foreign territories before mentioned; in a penalty, varying in proportion to the burthen of the ship, but never exceeding 1,000*l.*, as a security that the certificate shall not be lent, sold, or disposed of, but solely used for the service of the ship for which it is granted; and in case of the loss, capture, or destruction of the ship, or of the transfer of the whole or any share of it to a *foreigner*, be delivered up to the persons authorized by the statute to receive it (1).

(and it states the contents of the certificate) and the description and admeasurement having been agreed to by the owner or his agent, and sufficient security having been given agreeably to the act, the ship has been duly registered at the port where the registry is made. Where a new certificate is granted on a transfer, the words are so varied as to refer to the former certificate of registry for her admeasurement. ibid. sect. 9. So where the master makes oath of his citizenship the words are varied accordingly. ibid.

(1) So, before granting a certificate of registry, the act of the U.S. requires that the husband or acting or managing owner of the ship should, with the master and with a surety or sureties, give bond to the United States in a penalty varying in proportion to the burthen of the ship, from 400 to $2000, with condition that the certificate shall be solely used for the ship, for which it is granted, and shall not be sold, lent, or otherwise disposed of to any person; and that in case the ship shall be lost, or taken by an enemy, burnt or broken up or otherwise prevented from returning to the port to which she belongs, or in case she shall be sold when at sea or in a foreign port to a foreigner or for his benefit, the certificate shall be delivered up

9. Whenever the *master* of the ship is *changed*, the certificate must be delivered to the person authorized to make registry at the port, where the change shall take place, who is to indorse upon it a memorandum of the change, and give notice thereof [37] to the officer of the port of register, who is to make a memorandum of it in the book of registers, and give notice thereof to the commissioners of the customs (*f*) : and the new master must execute a fresh bond similar to the original security (*g*). (1)

(*f*) 26 *Geo.* 3. *c.* 60. *s.* 18. (*g*) 27 *Geo.* 3. *c.* 19. *s.* 7.

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within eight days after the arrival of the master within any district of the U. S. to the collecter of such district; and in case of a sale to any foreigner when the ship is within a district of the U. S., that it shall be delivered up to the collector thereof within seven days. Act, 31. December, 1792. sect. 7.

And if any certificate of registry be fraudulently or knowingly used for any ship not then actually entitled to the benefit of it, such ship is forfeited. ibid. sect. 27.

(1) When the master of a registered ship is changed, the owner or the new master is to report such change, to the collector of the port where such change happens, or where the ship shall first be after the change, and to produce to him the certificate of registry, and make oath or affirmation that the new master is a citizen of the U. S., and the manner in which he is so. The collector is thereupon to indorse upon the certificate a memorandum of the change, specifying the name of the new master, and to transmit a copy of it to the collector of the district where the ship is registered, if it be not his district, and such collector shall make a like memorandom of such change in his book of registers, and transmit a copy of

10. To prevent the frauds formerly committed by *changing the names* of ships, the name, by which a ship has been registered, must never be changed ; and must be painted, with the name of the port, to which she belongs, in a conspicuous manner on the stern of the ship (*h*). (1)

11. If any registered ship is *altered* afterwards in form or burthen, by being lengthened or built upon, or altered from a sloop to a brigantine, or from one denomination of vessel to another, by the mode of rigging, or fitting, such ship must be registered anew, as soon as she returns to the port, to which she belongs, or to any other in which she may be registered (*i*). (2)

(*h*) 26 *Geo.* 3. *c.* 60. *s.* 19. (*i*) 26 *Geo.* 3. *c.* 60. *s.* 24.

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it to the Register of the Treasury. If this change is not reported the registry is void, and the master forfeits one hundred dollars. Act, 31. December, 1792. sect. 15.

So if a registered ship be sold or transferred, in whole or in part to a foreigner by way of trust, confidence, or otherwise, the sale or transfer must be reported in the same manner, or the ship will be forfeited ; but if the ship be owned in part only, the shares of the owners, conusant of the sale or transfer, are only forfeited. ibid. sect. 16.

(1) The name of every registered ship in the U. S. and the port to which she belongs, must be painted on her stern on a black ground in white letters of not less than three inches in length, under the penalty of fifty dollars. Act, 31. December, 1792. sect. 3.

(2) If any registered ship in the U. S. be altered in form or burthen by being lengthened or built upon, or from one denomination to another by the mode of rigging or fitting, she

12. The certificates thus granted, are to be *numbered progressively* by the persons granting them, beginning a numeration every year; who are also to copy them into a book to be kept for that purpose, and [38] transmit exact copies to the commissioners of the customs at *London*, or *Edinburgh*, according to the department to which they belong; and copies of those transmitted to *Edinburgh* are afterwards to be transmitted to the commissioners of the customs in *England* (*k*). (1)

13. The master of every registered ship must, on demand, *produce the certificate* of registry to the principal officer of every port in his Majesty's dominions, or to the *British* consul or chief *British* officer, in any foreign port, to which she shall arrive, under the penalty of 100*l.* (*l*). (2)

(*k*) 26 *Geo.* 3 *c.* 60. *s.* 35 & 36. (*l*) 26 *Geo.* 3. *c.* 60. *s.* 34.

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must be registered anew by her former name, or she will cease to be deemed a ship of the U. S. When the new registry is applied for, the former certificate is to be delivered to the collector to whom application is made. If not so delivered up, the owner forfeits five hundred dollars, unless it is lost, destroyed, or unintentionally mislaid. Act, 31. December, 1792. sect. 14. ibid. sect. 6.

(1) The certificates granted to registered ships in the U. S. are to be numbered progressively, beginning anew at the commencement of every year; and an exact copy of each certificate is to be entered in a book kept for the purpose, and also transmitted once in three months to the register of the Treasury. Act, 31. December, 1792. sect. 19.

(2) Upon the *entry* of every registered ship from any foreign port, the register and documents of the ship are to be deposited

14. So valuable an instrument ought to be kept with the greatest care; but as it may nevertheless happen to be *lost* or *mislaid*, a new register and certificate may be granted upon taking the oath before-mentioned, and entering into a bond for delivering up the old certificate, if found, and making no improper use of it. If the loss be discovered, when a ship belonging to this country is in the plantations abroad, the certificate granted there will be in force only until her return home(*m*). (1)

(*m*) 15 *Geo.* 2. *c.* 31. *s.* 2 & 3. and 26 *Geo.* 3. *c.* 60. *s.* 22 & 23. But, *Query*, whether oath of the loss must not also be made?

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with the collector. Act, 2. March, 1799. sect. 64. 4 U. S. L. 384. Upon such entry an oath or affirmation must be made, that it contains the names of all the then owners of the ship, or if any part has been transferred since the granting the register, that such is the case, and that no foreigner has any share by way of trust, confidence, or otherwise in the ship. This oath or affirmation is to be taken by the owner or part-owner, if the entry be at the port where they reside, otherwise by the master. If the owner or master refuse to take the oath or affirmation, the ship loses the privileges of an U. S. ship, Act, 31. December, 1792. sect. 17.

(1) So by the act of the U. S. if the certificate be lost, destroyed or mislaid, a new register may be granted by the collector of the port where the ship shall first be, after such loss, destruction or mislaying, upon an oath or affirmation made by the master or other person having command of the ship, stating the loss, and when complying with the other requisites of the act in order to the registry of ships; and the new register, if granted in any other district than that to which the ship belongs, is valid only for ten days after her first arrival within the district to which she belongs, and must then be given up and a new one granted; otherwise a penalty of one hundred dollars is incurred. Act, 31. December, 1792. sect. 13.

15. And, as it has sometimes happened that the master of the ship, who is necessarily entrusted with the possession of the certificate, while the ship is at sea, has obstinately *refused to deliver* it, when [39] the owners have had occasion for it; the Legislature has twice endeavoured to provide a remedy for this grievance. First by a statute (*n*) made in the *twenty-eighth* year of his present Majesty's reign, which takes notice that it has been found, that masters of ships have wilfully and maliciously detained and refused to deliver up certificates of registry, to the prejudice of the owner or owners, and by which it is enacted, "That on com-"plaint made on oath (by the owner, or any of the "owners, of any ship or vessel, whose certificate of reg-"istry shall be so detained and refused to be delivered "up) of such detainer and refusal, to any Justice of "the Peace residing near to the place, where such de-"tainer and refusal shall be, either in *Great Britain* or "in the islands of *Jersey*, *Guernsey*, or *Man*, or in any "Colony, Plantation, Island, or Territory, to his Ma-"jesty belonging in *America*, it shall and may be lawful "for such Justice, by warrant under his hand and seal, "to cause such master to be brought before him, to be "examined touching such detainer and refusal; and if "it shall appear to the said Justice, on examination of "the master or otherwise, that the same is not lost or "mislaid, but *is wilfully and maliciously* detained by "the said master, such master shall be thereof convict-"ed, and shall forfeit and pay the sum of *one hundred* "*pounds*, and on failure of payment thereof, [40] "within the space of *two* days after such con-"viction, he shall be committed to the common

(*n*) 28 *Geo.* 3. *c.* 34. *s.* 13, 14.

"gaol, there to remain, without bail or mainprize, for "such time as the said Justice shall in his discretion "deem proper, not being less than *six* months nor more "than *twelve* months." And that it shall and may be "lawful for the said Justice, and he is hereby required "to issue a warrant under his hand and seal, to "cause search to be made for such certificate, and "if the same shall be found, the said Justice shall cause "the same to be delivered to the owner, or such of the "owners, as shall have made the said complaint; and "if the same shall not be found, the said Justice shall, "and he is hereby required to certify the aforesaid de- "tainer, refusal, and conviction, to the person, or per- "sons, who granted the last certificate of registry for "such ship or vessel, who shall, on the terms and con- "ditions of the said acts being complied with, make "registry of such ship or vessel *de novo*, and grant a "certificate thereof, conformably to the directions of the "said acts, notifying on the back of such certificate the "ground upon which such ship or vessel was so regis- "tered *de novo*."

And by a subsequent statute (*l*), taking notice of the above provisions, and that the good purposes intended thereby had not been effected, and that it was therefore expedient to make *further* provisions for preventing the masters of ships from withholding certificates [41] to the prejudice of the owners; it is enacted, "That "in case the master of any ship or vessel, who shall have "received the certificate of the registry thereof (whether "such master shall be a part-owner or not) shall wil- "fully detain and refuse to deliver up the same, to the "proper officers empowered to make registry, and grant

(*l*) 34 *Geo.* 3. *c.* 68. *s.* 18.

"a certificate thereof, on the owner and owners, or the "major part of the owners, of such ship or vessel, if "such master has not any property therein; or on the "other owner or owners, or the major part of the other "owners, of such ship or vessel, if such master hath "any share or property therein, requiring him so to do, "it may and shall be lawful to and for the owner or "owners, or the major part of the owners, of such ship "or vessel, the certificate of registry of which shall be "detained and refused to be delivered up as aforesaid, "to make complaint on oath against the master of the "ship or vessel, who shall so detain and refuse to de- "liver up the same, of such detainer and refusal, to "any Justice of the Peace residing near to the place, "where such detainer and refusal shall be, in Great "Britain, or to any member of the Supreme Court of "Justice, or any Justice of the Peace in the islands of "*Jersey*, *Guernsey*, or *Man*, or in any Colony, Planta-
"tion, Island, or Territory, to his Majesty be-
[42] "longing in *America* or the *West Indies* where
"such detainer and refusal shall be in any of the "places last mentioned; and, on such complaint, the "said Justice or other Magistrate shall, and is hereby "required, by warrant under his hand and seal, to cause "such master to be brought before him, to be examined "touching such detainer and refusal; and if it shall "appear to the said Justice or other Magistrate, on "examination of the master, or otherwise, that the said "certificate of registry is not lost or mislaid, but is "*wilfully* detained by the said master, such master shall "be thereof convicted, and shall forfeit and pay the "sum of *one hundred pounds*, and on failure of pay- "ment thereof, he shall be committed to the common

"gaol, there to remain, without bail or mainprize, for "such time as the said Justice or other Magistrate shall "in his discretion deem proper, not being less than *six* "months nor more than *twelve* months." This statute does not authorize the Magistrate to grant a search warrant, but it requires the detainer to be certified, and a new certificate of registry granted, in the same words as the preceding statute(1).

16. These several regulations are applicable to British ships, while they remain the property of their original owners. Other provisions are made by the statutes to regulate the *transfer* of the property wholly or in part, from one person to another; and as no transfer can be valid without a compliance with them, I will now proceed to state the regulations, and [43] then to mention the judicial decisions, that have taken place upon the construction of these statutes.

In the first place, therefore, the first of the statutes now under consideration enacts(*m*), "That when and "so often as the property in any ship or vessel, belong-"ing to any of his Majesty's subjects, shall be *trans-*"*ferred* to any other or others of his Majesty's sub-"jects, in whole or in part, the certificate of the regis-" try of such ship or vessel shall be truly and accurately

(*m*) 26 *Geo.* 3. *c.* 60. *s.* 17.

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(1) There is no provision in the acts of the U. S. similar to this clause of the English Statute. In cases where the master is required to deliver up the certificate to the *Collector*, if he refuse, he incurs a pecuniary penalty, and the ship loses her right to the privileges of an U. S. ship. Act, 31. December, 1792. sect. 13, 17. &c.

"recited, in words at length, in the bill or other instru-
"ment of sale thereof, and that otherwise such bill of
"sale shall be utterly null and void to all intents and pur-
"poses."

A subsequent statute (*n*), reciting, that upon this clause doubts had arisen, whether *every* transfer of property was required to be made by an instrument in writing, and whether contracts or agreements for the transfer might not be made *without* such an instrument, enacts, "That no transfer, contract, or agreement for transfer
"of property, in any ship or vessel, made or intended
"to be made after the *first* day of *January*, 1795, shall
"be valid or effectual for any purpose whatsoever,
"either in law or equity, unless such transfer, contract
"or agreement for transfer, of property in such ship
"or vessel, shall be made by bill of sale, or in-
[44] "strument in writing, containing such recital as
"prescribed" by that clause (1).

17. But this is not the only requisite to a transfer of property. Further requisites are introduced by the statutes.

(*n*) 34 *Geo.* 3 *c.* 68. *s.* 14.

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(1) The act of the U. S. requires that upon every transfer there shall be some instrument in writing, in the nature of a bill of sale, which shall recite at length the certificate of registry, otherwise the ship shall be incapable of being registered anew, and loses the privileges and benefits of a ship of the U. S. Act, 31. December, 1792. sect. 17. But the act does not invalidate the contract as between the parties, but leaves it to the general operation of law. It only deprives the ship of her former character, and treats her as a *foreign* ship.

First. When an alteration of property takes place *in the port* to which the ship belongs.

In this event, the first of the recent statutes, referring to the statute passed in the reign of *King William* (*o*), which requires "That in case there be any alteration "of property in the same port, by the sale of one or "more shares in any ship, after registering thereof, such "sale shall always be acknowledged by *indorsement* on "the certificate of the register before two witnesses, in "order to prove that the entire property in such ship "remains to some of the subjects of *England*, if any dis- "pute arises concerning the same," further directs (*p*), "That in every such case, besides the indorsement re- "quired by the said act, there shall be also *indorsed*, "before two witnesses, the town, place, or parish, "where all and every person or persons, to whom the "property in any ship or vessel, or any part thereof, "shall be so transferred, shall reside; or if such per- "son or persons usually reside in any country, not un- "der the dominion of his Majesty, his heirs and suc- "cessors, but in some *British* factory, the name of such "factory, of which such person or persons is or "are member or members; or if such person [45] "or persons reside in any foreign town or city, "and are not members of some *British* factory, the "name of such foreign town or city, where such person "or persons usually reside, and also the names of the "house or co-partnership in *Great Britain* or *Ireland*, "for or with whom such person or persons is or are "agent or partner, or agents or partners; and the per- "son or persons, to whom the property of such ship or "vessel shall be so transferred, or his or their agent,

(*o*) 7 & 8 *Will.* 3. *c.* 22. *s.* 21. (*p*) 26 *Geo.* 3. *c.* 60. *s.* 16.

"shall also deliver a copy of such indorsement to the "person or persons authorized to make registry, and "grant certificates of registry as aforesaid, who are "hereby required to cause an entry thereof to be in- "dorsed on the oath or affidavit, upon which the orig- "inal certificate of registry of such ship or vessel was "obtained; and shall also make a memorandum of the "same in the book of registers, which is hereby direct- "ed and required to be kept, and shall forthwith give "notice thereof to the commissioners of his Maj- "esty's customs in *England* or *Scotland*, under whom "they respectively act."

The subsequent statute (*q*) also prescribes the form of this *indorsement*, and requires it in the case of [46] contract, or agreement for sale, as well as absolute sale, and renders it essential to the validity of the sale, contract, or agreement. For it enacts, "That such indorsement shall, from and after the *first* "day of *January*, 1795, be made in the manner and "form hereinafter expressed, and shall be signed by the "person or persons transferring the property of the said "ship or vessel, by sale, or contract or agreement for "sale thereof, or by some person legally authorized for "that purpose by him, her, or them; and a copy of

(*q*) 34 *Geo.* 3. *c.* 68. *s.* 15. I have ventured to state, that by this statute an indorsement is required in the case of contract or agreement for sale, as well as absolute sale; because, although the form of the indorsement is applicable to the case of actual sale only, yet, adverting to the words, "transferring the property by "sale, or contract or agreement "for sale," used in this section, and to the words, "contract or a- "greement for transfer," used in the preceding section of this statute, which there plainly denote something different from absolute transfer; it seems probable the Legislature intended that the form of the indorsement should be varied according to the nature of the transaction; and that the words, *contracted to sell and transfer*, should be used in the indorsement instead of the words, *have sold and transferred*, if the case require it. So the expression *all* my right, &c. must be variable, if the vendor transfer only a part of his interest in the ship.

" such indorsement shall be delivered to the person or " persons authorized to make registry and grant certif- " icates of registry, otherwise such sale, or contract or " agreement for the sale thereof, shall be utterly null " and void, to all intents and purposes whatsoever; " and such person or persons so authorized to make " registry, and grant certificates of registry, are hereby " required to cause an entry thereof to be indorsed on " the oath or affidavit, upon which the original certifi- " cate of registry of such ship or vessel was obtained, " and shall also make a memorandum of the same " in the book of registry, and shall forthwith give [47] " notice thereof to the commissioners of his Maj- " esty's customs in *England* and *Scotland*, under whom " they respectively act."

" Form of Indorsement on Change of " Property.

" Be it Remembered, That [I, *or* we] [*names, resi-* " *dence and occupation of the persons selling*] have this " day sold and transferred all [my, *or* our] right, share, " or interest in and to the ship, or vessel [*name of the* " *ship or vessel*] mentioned in the within certificate of " registry unto [*names, residence, and occupation of the* " *purchasers*]. Witness [my, *or* our hand *or* hands] " this [*date in words at full length*].

" Signed in the presence of

" [*Two witnesses*]."

18. Instead, however, of this *indorsement*, in case of a partial transfer of property in the *same port*, the ship may, under certain circumstances, be *registered anew*. For the last statute(r), *reciting* that by the statute of *King William* before referred to, it is enacted, " That

(r) 34 *Geo.* 3. *c.* 68. *s.* 21.

" in case there be any alteration of property in the *same* " *port*, by the sale of one or more shares in any ship, " after registering thereof, such sale shall always be " acknowledged by indorsement on the certificate of the " register before two witnesses, in order to prove [48] " that the entire property in such ship remains " to some of the subjects of *England*." And further reciting, " That it is expedient to authorize and " require the proper officers empowered to register " ships and vessels, and to grant certificates thereof, " to issue registers *de novo*, in any case where *part* of " the property of any ship or vessel shall be so trans- " ferred, if the owners or proprietors of such ship or " vessel, who were owners thereof at the time such ship " or vessel was last registered, and whose property " therein has not been so transferred, shall be desirous " of having a certificate of registry *de novo, instead of* " *the indorsement on the old register, as now required*," proceeds to enact, " That in case there shall be any " alteration of property in the *same port*, by the sale " of one or more shares in any ship or vessel, after reg- " istering thereof, and the owner or owners, proprietor " or proprietors, of such ship or vessel, who were " owners or proprietors thereof at the time such ship " or vessel was last registered, or whose property there- " in has not been so transferred, shall be desirous of " having the ship or vessel registered *de novo*, it shall " and may be lawful to and for the proper officers em- " powered to register ships and vessels, and to grant " certificates thereof, and such officers are hereby au- " thorized and required to register every such ship or " vessel *de novo*, provided all the rules, regulations, and " conditions of the before recited act, passed in the

"*twenty-sixth* year of the reign of his present Majesty, "and of all other laws in force concerning the "registry of ships and vessels *de novo*, be com- [49] "plied with." (1)

19. SECONDLY. When an alteration takes place during the *absence* of the ship *from the port* to which she belongs.

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(1) Whenever a registered ship of the U. S. is sold or transferred in whole or in part to a citizen of the U. S. she must be registered anew by her former name, and the requisites of the law in common cases of registry must be complied with, otherwise she ceases to be a ship of the U. S. And in this case her former registry must be given to the collector, to whom application is made for the new registry. And if the certificate of registry is not delivered up, upon such sale or transfer, the owner forfeits five hundred Dollars, unless the same is lost, destroyed, or unintentionally mislaid, and oath or affirmation made thereof. Act, 31. December, 1792. sect. 14.

When the register of a ship is delivered up agreeably to law to the collector of the district where it was granted, the *bond* given at the time of granting it, is to be *cancelled;* but if delivered up to any other collector, he is to give a receipt or acknowledgment of the delivery, and specify the time when; and upon this receipt being produced to the collector, who granted the register, he is to cancel the bond. ibid. sect. 18.

In case of a sale and transfer by *process of law*, if the former owners do not surrender up the register, upon proof of the facts, to the Secretary of the Treasury, he may direct the collector of the district to which the ship belongs, to grant a new register to the purchasers, upon their complying with the other conditions, required in ordinary cases. Act, 2. March, 1797. sect. 1. 3 U. S. Laws, 383.

In this case the last statute (*x*) provides, "That if "any ship or vessel shall be at sea, or absent from the "port to which she belongs, at the time when such al- "teration in the property thereof shall be made as "aforesaid, so that an indorsement or certificate (*y*) "cannot be immediately made, the sale, or contract or "agreement for the sale thereof, shall notwithstanding "be made by a bill of sale, or other instrument in writ- "ing, as before directed, and a copy of such bill of sale, "or other instrument in writing, shall be delivered, and "an entry thereof shall be indorsed on the oath or affi- "davit, and a memorandum thereof shall be made in "the book of registers, and notice of the same shall be "given to the commissioners of the customs, in the "manner herein-before directed (*z*): and within *ten* "days after such ship or vessel shall return to the port, "to which she belongs, an indorsement shall be made "and signed by the owner or owners, or some persons "legally authorized for that purpose by him, her, or "them, and a copy thereof shall be delivered in man-
"ner herein-before mentioned, otherwise such
[50] "bill of sale, or contract or agreement for sale
"thereof, shall be utterly null and void, to all in- "tents and purposes whatsoever; and entry thereof "shall be indorsed, and a memorandum thereof made, "in the manner herein-before directed." (1)

(*x*) 34 *Geo.* 3. *c.* 68. *s.* 16.
(*y*) This is evidently a mistake, and should be indorsement on the certificate.
(*z*) *Viz.* in *s.* 15. of this statute ante, page 46.

(1) In the act of U. S. 2. March, 1803. ch. 71. sect. 3. (6 U. S. L. 225.) provision is made for cases of ships abroad at the time of sale. By this act when a registered ship is sold or transferred in whole or in part to a citizen of the U. S., while

20. And as in case of the owners residence *out of the King's dominions*, it would be impossible to comply with several of the requisites before-mentioned, it is by the last statute (*a*) provided and enacted, "That in all "cases, where the owner or owners of any ship or ves- "sel shall reside in any country *not* under the domin- "ion of his Majesty, his heirs and successors, as mem- "ber or members of some *British* factory, or agent or "agents for, or partner or partners in, any house or "co-partnership actually carrying on the trade in *Great- "Britain* or *Ireland*, at the time when he, she, or they "shall transfer such property in any ship or vessel, so "that an indorsement cannot be made immediately, nor

(*a*) 34 *Geo.* 3. *c.* 68. *s.* 17.

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she is without the limits of the U. S., she is to be entitled to all the privileges of registered ships of the U.S., provided all the requisites of law for the registry of ships are complied with, and a new certificate of registry obtained for such ship, within three days from the time at which the master or other person having the charge or command of the ship is required to make his final report, upon her first arrival afterwards in the U.S., agreeably to the 30th section of the act 2. March, 1799, for regulating the collection of duties on imports and tonnage. And the tonnage duties of such ship are payable at any time within the three days.

If a ship is sold by a master while abroad, under an express or implied power from the owner to sell, in case of extreme necessity, still the ship must (as between British subjects) be transferred by the master, according to the requisitions of the registry acts, if she specifically subsists as a ship, but perhaps it would be otherwise where she was a mere wreck. Reid v. Darby. 10 East. 143. See ante as to master's right to sell, p. 7.

"a copy of such bill of sale, or other instrument in "writing, be delivered, nor an entry thereof indorsed "on the oath or affidavit, nor a memorandum thereof "made in the book of registers, nor notice of the same "given to the commissioners of the customs in the man- "ner before-mentioned, the same may be done at any "time within *six months* after such transfer shall have "been made; and that within *ten days* after such "owner or owners, or some person legally au- [51] "thorized for that purpose, by him, her, or "them, shall arrive in this kingdom, if such ship or "vessel shall then be in any port of this kingdom, and "if not, then within *ten days* after such ship or vessel "shall so arrive, an indorsement shall be made by the "owner or owners, or some person legally authorized "for that purpose by him, her, or them, and a copy "thereof shall be delivered in manner herein-before "mentioned, otherwise such bill of sale, or contract or "agreement for sale thereof, shall be utterly null and "void to all intents and purposes whatsoever; and "entry thereof shall be indorsed, and memorandum "thereof made in the manner herein-before direct- "ed." (1)

21. In all cases, however, when a ship is required to be registered *anew* upon any *transfer* of the property wholly or in part, the registering officers are authoriz-

(1) As no indorsement is required by the act of the U. S.,no provision exists similar to that contained in this section. And no provision in any case seems to be made, whereby a partner or agent, who is abroad, may take the oath or affirmation, or comply with the other conditions required by law to obtain a registry of a ship.

ed and directed to require the bill or other instrument of sale thereof to be produced; and, if it is not produced, they are not to register the ship anew, but four of the commissioners of the customs in *England*, or three in *Scotland*, or the commander in chief in *Guernsey*, *Jersey*, and the foreign territories, may, if application is made to them, upon due consideration of the particular circumstances of the case, give direction for registering the ship anew, and granting a certificate, notwithstanding the bill or other instrument of sale [52] shall not have been produced, if all other regulations are complied with (*b*). (1)

22. Under this head of transfer of property, it seems fit to notice the provisions made by the Legislature to prevent such *transfer* from being made *to a foreigner*. It must be obvious, from what has been already pointed out, that a transfer of any share to a foreigner would deprive the ship of its privileges, and consequently greatly prejudice the owners of the other shares; and, to prevent this evil, it was enacted by a statute, made in the *thirteenth* year of the present reign (*c*), and which is now in force, "That no *foreigner*, or other person or "persons whatsoever, not being a *natural-born* subject "of his Majesty, his heirs or successors, shall be entit-"led to, or shall purchase, or contract for, any part or

(*b*) 34 *Geo.* 3. *c.* 68. *s.* 20. (*c*) 13 *Geo.* 3. *c.* 26.

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(1) So the act of the U. S. requires that there should be produced a bill of sale, or other instrument in writing, wherever there is a transfer of the ship, before she can be registered anew. Act, 31. December, 1792. sect. 14. And no authority seems given to any officer to dispense with this rule in any case.

" parts, share or shares, of any *British* ship or vessel " whatsoever, belonging only to natural-born subjects " of his Majesty, his heirs or successors, without the " consent in writing of the owner or owners of three- " fourth parts in value, at least, of such ship or vessel, " for that purpose first had and obtained, and indorsed " on the certificate of the register of such ship before " two witnesses; and all agreements, contracts, purcha- " ses, and sales of any part or share of any *British* ship " or vessel, belonging only to *natural-born* sub- " jects of his Majesty, his heirs or successors, [53] " made, entered into, contracted for, or conclud- " ed, by any such foreigner, or other person or persons, " not being a *natural-born* subject or subjects of his " Majesty, his heirs or successors, without such con- " sent first had and obtained, and indorsed as aforesaid, " shall be, and are hereby declared to be absolutely null " and void, to all intents and purposes whatsoever."

That part of the statute of the *twenty-sixth* year of the present reign, which provides for the *surrender* of the certificate in the case of transfer to a *foreigner*, has been already noticed (*d*): I have not found any statute which requires a new register after a transfer of property wholly or in part to a *foreigner*. Doubtless, if a ship transferred to a *foreigner* should be re-transferred to a subject, so as to become entitled to claim again the privileges of a *British* ship, a new register would be necessary to revive the privileges; yet this does not appear to satisfy the words used in a section of a late statute (*e*), which, if I rightly understand it, requires a ship to proceed to some port in order to be registered anew, in case of a transfer of part made to a *foreigner*,

(*d*) *Chap.* 60. *s.* 15. ante, page 36. (*e*) 34 *Geo.* 3. *c.* 68. *s.* 22.

which, for want of the consent of the other part-owners, may be null and void in consequence of the beforementioned statute of the *thirteenth* year of the present reign; but, as I am not satisfied that I perfectly comprehend the meaning of the words, I shall refer the reader to the Appendix, in which it will be found [54] at length that I may not mislead his judgment by abridging it (1).

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(1) There is no clause in the act of the U. S. requiring the assent of the other owners to the transfer of a part of a registered ship to a foreigner. But every such transfer, whether by way of trust, confidence, or otherwise, must be made known, otherwise a forfeiture is incurred of the ship in manner as is stated in note to p. 37. Act, 31. December, 1792. sect. 16.

It has moreover been the policy of the legislature of the U. S. for the purpose of encouraging ship-building among our citizens, to confer certain privileges on ships built within the U. S., even when owned by *foreigners*. These privileges are not equal to the privileges enjoyed by citizens of the U. S., but are superior to those of foreign built ships. Such ships are entitled to be *recorded*.

Every such ship must be recorded in the office of the collector of the district in which she was built. In order to entitle her to be recorded, the carpenter who built her, is to make *oath or affirmation* before the collector, that he built her, and is to give a description of her, similar to that required on the registry of a new ship. She must also be measured, and a certificate of the admeasurement be made and countersigned, and a certificate of the *record* be granted, in the same manner as is required in cases of registry. Act, 31. December, 1792. sect. 20. 21. 22.

Every change of the master must be indorsed on the certificate, and recorded and transmitted in the same manner, as in cases of registered ships. ibid. 23. On *entry*, the certificate of

23. Having thus detailed the several legislative provisions on this important subject, I proceed to notice

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the record must be produced to the collector, where the ship is entered. ibid. 24. Neglect or refusal in either case, occasions a forfeiture of the privileges of a recorded ship.

The preceding notes refer to ships employed as *registered* or *recorded* ships in foreign trade. It may not be amiss perhaps to add some of the provisions that affect ships engaged in domestic trade.

As to ships engaged in the coasting trade or fisheries, in order to entitle them to the privileges of ships of the U. S., in such employment, they must be enrolled, and for that purpose must (as has been before stated) possess the same qualifications, and the same requisites must be complied with, as are made necessary for registering ships. And the same duties and authorities are given and imposed on all officers respectively, in relation to such *enrolments*, and the same proceedings are to be had, in similar cases, touching such enrolments; and the ships so enrolled, with the master or owner, are subject to the same requisites, as are in those respects provided for ships registered. A record of the enrolment is to be made, and a certificate or copy granted, in the form prescribed by law. Act, 18. February, 1793. ch. 8. sect. 1. 2. 2 U. S. L. 168. But if a ship be under twenty tons, she need not be *enrolled*, but must be *licenced*. ibid. Ships so enrolled, must moreover have a licence in force for the coasting trade or fisheries, before they are entitled to the privileges of the ships of the U. S. And in order to the licencing of a ship, the husband or managing owner, must give a bond with one or more sureties, in a sum varying according to the tonnage of the ship, from one hundred to one thousand dollars; that the ship shall not, during the existence of the licence, be engaged in any trade whereby the revenue of the U. S. shall be defrauded. And the master must also swear

the *judicial determinations*, to which they have given rise. It may be proper also to observe, that similar

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or affirm, that he is a citizen of the U. S., and that the licence shall not be used for any other ship, or any other employment, than that for which it is specially granted, or in any trade or business, whereby the revenue of the U. S. may be defrauded. And if the ship be of less burthen than twenty tons, the husband or managing owner, must swear or affirm that she is wholly the property of citizens of the U. S. The licence is then to be granted in the form prescribed by law, and is in force generally for a year only; and while she continues to be owned by the same person, and to be of the same description, and employed in the same business as are stated in the licence. ibid. sect. 4. 5.

Registered ships may be enrolled by giving up their register, and so *vice versa* enrolled ships may be registered upon giving up their enrolment and licence. And when any ship is in another district than that to which she belongs, the collector of such district, upon the application of the master or commander, and his taking an oath or affirmation that, according to his best knowledge and belief, the property remains as stated in the register or enrolment, proposed to be given up, and upon his giving the bonds required for granting registers, shall make the exchanges aforesaid. The enrolment and licence, or register so granted, must be delivered to the collector of the district where the ship belongs, within ten days after her arrival therein, and be by him cancelled, under the penalty of one hundred dollars to be paid by the master. ibid. sect. 3.

Ships not enrolled and licenced, or under twenty tons burthen, not licenced, (other than *registred ships*,) if found trading between district and district, or between different places in the same district, or carrying on the fisheries, pay the same fees and tonnage as foreign ships, if laden with goods, the growth

regulations have been made with respect to *Irish* ships (*f*). (1)

(*f*) *Irish* Statute, 27 *Geo.* 3. *c.* 23. Statute of the United Kingdom, 42 *Geo.* 3. *c.* 61.

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or manufacture of the U. S. only, (distilled spirits excepted) or in ballast; but if having on board any articles of foreign growth or manufacture, or distilled spirits, other than sea stores, are, with their lading, forfeited. ibid. sect. 6. Ships found with a false licence, or making use of a licence belonging to another ship, are together with their cargo forfeited. ibid. sect. 5. Ships *licenced*, if transferred to any person not a citizen of, and resident within the U. S., or if employed in any other trade than that for which they are licenced, are together with their cargo forfeited. ibid. 32. Ships enrolled and licenced, if proceeding on a foreign voyage without delivering up the enrolment and licence, and being duly registered, are, together with the cargo imported, forfeited. ibid. sect. 8. But ships licenced for the fisheries, may obtain permission to touch and trade at foreign ports, and may thereupon take on board goods of foreign growth or manufacture; but if found with such goods on board within three leagues of the coast, without having such permission are, together with such goods imported therein, forfeited. ibid. sect. 21. But these forfeitures do not apply to any part of the cargo, which is owned by other persons than the master, owner or mariners of the ship. ibid. 33.

Registered ships are not interdicted from trading between district and district, but their privileges are not as great as those

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(1) The registry acts of the U. S. have not as yet, given rise to many judicial decisions. But the following have been reported, and may be properly introduced in this place.

Courts of law will not lend their aid to sanction any proceedings in violation of the registry acts; and therefore they will not enforce contracts which are made in fraud of them. Therefore where one Coulson, an alien, had employed funds to a con-

The general object of the statutes has been already pointed out, namely, the restriction of the commercial privileges formerly enjoyed by *British* owners of ships, wherever built, to *British* owners of ships, built within the dominions of his Majesty. All such

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of licenced ships. ibid. sect. 6. 20. 33. Foreign ships also may trade in like manner in goods of the growth or manufacture of the U. S., but not of foreign countries. ibid. sect. 6. 24.

The licences granted are to be numbered progressively, beginning *anew* every year. ibid. sect. 7. Ships licenced or enrolled, or registered *anew*, or exchanged the one for the other, are to hold their former name. ibid. sect. 7., and are to have their names and the ports where they belong painted on their sterns. ibid. sect. 11. Every change of the master of such ships is to be reported to the collector and indorsed upon the licence, and a neglect in this particular, subjects the ships to pay the fees and tonnage of registered ships. ibid. sect. 12.

There are various other regulations respecting ships employed in the coasting trade and fisheries, in the act above cited; but the foregoing seem to be the most material to be noticed in these annotations.

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siderable amount in foreign trade, of which Joseph Anthony & Co., who were American citizens, were the ostensible owners, and the ships were registered by them as their own, and the cargoes entered at the custom house as their own; for which Coulson paid them a commission; and afterwards cross actions were brought and referred, and a balance reported to be due to Anthony & Co.; upon objection being made to the report of the referees, on the ground that the balance grew out of these illicit transactions, the Supreme Court of Pennsylvania decided against the affirmance of the report, and said that the positive provisions of the laws of the U. S. respecting registered ships,

ships are *entitled* and *required* to be registered; but by reason of the particular penning of that clause of the statute, which subjects ships to forfeiture for departing from port without being registered, it seems that the forfeiture is imposed on such ships only, as were in existence at the passing of the statute, and departed from

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the natural policy of the navigation system, good faith towards belligerent powers, and the very foundations of morality were violated in these transactions; and that no court of justice in the U. S. could lend its aid, at any time, or in any degree, to recover a debt originating in a source so forbidden, so foul, and so pernicious. Maybin v. Coulson. 4 Dall. Rep. 298. The same doctrine was held in Duncanson v. M'Lure. 4 Dall. Rep. 308, which was trover brought by an alien owner to recover a ship of a purchaser under a foreign condemnation—and by the Circuit Court of the U. S. in Murgatroyd v. M'Lure. 4 Dall. Rep. 342, which was an action of replevin brought by the plaintiff, as trustee of Duncanson, to recover the same ship.

It seems to have been thought by the Supreme Court of Pennsylvania at one time, that that part of the oath required to be taken by the owner or one of the owners upon application for registry, "that there is no subject or citizen of any foreign prince or state, directly or indirectly, by way of trust, confidence, or otherwise, interested in such ship or vessel, or in the profits or issues thereof," was applicable only to the case where an owner resides in a foreign country as a consul, or agent or partner of a house consisting of citizens of the U. S., and not to cases where the owner was resident in the U. S. Murgatroyd v. Crawford, 3 Dall. Rep. 491. But see the Act of 31. December, 1792. sect. 4. 7. 16. 17. And in a subsequent case, the same court declared that the doctrine in the above case was erroneous and untenable. Duncanson v. M'Lure. 4 Dall. Rep. 308.

their port without being registered, after their first arrival there, at the expiration of the notice thereby directed(*g*): and it is expressly declared by the *second* statute (*h*), that all ships not entitled to the privileges of a *British* ship, or of a ship owned by *British* subjects (which lat-

(*g*) 26 *Geo.* 3. *c.* 60. *s.* 32. But see the judgment pronounced by *Lord Eldon* in the case of *Long v. Duff*, 2 Bos. & Pul. 209.

(*h*) 27 *Geo.* 3. *c.* 19. *s.* 13.

The 4th sect. of the act of 31. December, 1792, having provided, that in case any of the matters of fact in the said oath alleged, which shall be within the knowledge of the party so swearing, shall not be true, there shall be a forfeiture of the ship and appurtenances, in respect to which the oath shall have been made, *or of the value thereof*, to be recovered with costs, of the party taking oath, a question has arisen whether, upon a forfeiture, the property of the ship actually vested in the U. S., before any election was made to proceed against the ship, or against the person taking the oath; and the Supreme Court of the U. S. have held that it did not so vest, and that therefore no action would lie against the assignees of a bankrupt, (who had taken the oath) to recover the purchase money received by them upon a sale of the ship, made by them before a seizure of the ship. U. S. v. Grundy, &c. 3 Cranch. Rep. 337. And it seems that the ship, in such case, cannot be seized in the hands of a *bona fide* purchaser, for the offence. See the case of the *Anthony Maugin*, in the District Court of U. S. in Maryland, cited in a note to 3 Cranch. Rep. 356.

The act of U. S. above cited, in the 14th sect. having required "that *when* any ship or vessel, which shall have been "registered pursuant to this act, or the act hereby in part re- "pealed, *shall*, in whole or in part, be sold or transferred to a "citizen or citizens of the U. S., or shall be altered in form or "burthen, &c.; *in every such case*, the ship or vessel shall be

ter have been already shewn to be such only as were so owned and registered under the old stat- [55] utes before the commencement of the new restriction) and all ships not registered according to the directions of the *first* of the new statutes, shall, although owned by his Majesty's subjects, be deemed *alien* ships,

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" registered anew by her former name, according to the direc- " tions herein before contained,(otherwise she shall cease to be " deemed a ship or vessel of the U. S.,)and her former certifi- " cate of registry shall be delivered up to the collector, to " whom application for such new registry shall be made, *at the* " *time that the same shall be made, &c. &c.*" a question has been very elaborately argued, as to the time when the new registry should be made, in order to preserve to the ship her American character. The question arose upon a bond given for the payment of duties on goods imported in a ship, and the amount to be liquidated, whether foreign or domestic duties, was disputed. The facts of the case were as follows :—The registered ship Missouri belonging to Mess. W. & F. sailed from Philadelphia to Canton. While at sea with her register on board, she was in part sold by Mess. W. & F. to J. G. K. & others, citizens of the U. S., but was not then registered anew by her former name, nor was there made any instrument in writing, in the nature of a bill of sale, writing at length the certificate of registry. After the ship returned from her voyage, and *before any report or entry*, J. G. K. and the others, the vendees, made a parole resale of their part of the ship to Mess. W. & F., so that the whole revested in them ; and, on the same day, afterwards, the register was delivered up by the master to the collector, and the ship duly reported and entered ; and F., one of the firm of Mess. W. & F., upon the entry offered to make oath, that the register contained the names of all the persons, who were then owners of the ship ; and stated the preceding facts.

and be liable to the same penalties and forfeitures as *alien* ships. It lately, however, became a question, whether a *foreign-built* ship could legally be owned by *British* subjects, and employed by them in the same trade, in which such a ship might be employed by *aliens*. The question arose in an action (*i*) upon a policy of in-

(*i*) *Long v. Duff*, 2 Bos. & Pul. 209.

About a month afterwards, Mess. W. & F. made a bill of sale to J. G. K. & others, reciting the register, and thereupon the ship was registered anew as the property of Mess. W. & F. & K. & others as joint owners ; and about a fortnight afterwards, K. & the others, reconveyed their part by a legal bill of sale to Mess. W. & F., and the ship was thereupon registered anew as the property of Mess. W. & F. The Supreme Court of the U. S. in delivering their opinion said, that the question depended much on the legislative meaning of the word *when*, in the section, whether it designated the precise time when a particular act must be performed, in order to save a forfeiture, or an occurrence which shall render that particular act necessary. It might be used either way ; but, in their opinion, it was in this section used in the latter sense. No man could contend that the transfer of a ship, and the obtaining of a new register, were to be simultaneous. The one must precede the other, and unless the transfer, or the repairs and alterations of the hull were in all cases to be made in the collector's office, a reasonable interval between those acts must be allowed, and this reasonable interval must depend on the nature of the case. Upon a transfer of a ship, while at sea, a new register is to be obtained, but this cannot be before the return of the ship, because the old certificate of registry must be given up before the new one is to be granted. It is then a clear consequence of establishing, that a new register was not required before the arrival of the ship Missouri, that on her arrival in port, she was an American ship,

surance on the ship *Lucy*, at and from *Padstow* in *Cornwall* to *Leghorn*. The ship was *Spanish-built*, purchased by the Plaintiff, a *British* subject; was not registered; had paid the alien duties; had sailed without convoy, and without licence to proceed without convoy; and had been captured on the voyage. The statute

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and her cargo, when imported into the U. S., was liable to the duties imposed on American, and not on foreign bottoms. If so, the subsequent failure to register the ship, would require very plain words to charge them with higher duties,—and it seemed to the court that the words of the act, that the ship should be registered anew upon every transfer, otherwise she should cease to be deemed a ship of the U. S., operated on future, not on past transactions. The meaning is, that she shall so cease after the lapse of the time, when she ought to have been registered anew. But before that time had elapsed, the Missouri had, as an American ship, actually imported a cargo, whose liability to duties had commenced. In the case of an alienation to a foreigner, the privileges of an American bottom, are *ipso facto* forfeited; but, if to a citizen, they are not forfeited until after the ship ought to have been registered anew, and the oath which entitles her to enter as an American bottom, does not require such a new register as a preliminary. The court were further of opinion, that in this case the intermediate alienation and repurchase of part of the ship had worked no forfeiture, and had created no necessity for a new register; and that as the names of all the persons, who were then owners of the ship, were in the old register, the oath required upon entry could be fairly taken. But as to the point, at what time a failure to register anew would affect the ship with forfeiture of her American character, they gave no opinion. U. S. v. Willings, &c. 4 Cranch. Rep. 48. S. C. 4 Dall. Rep. 374.

38 *Geo.* 3. *c.* 76. (*k*) had made it unlawful for any ships belonging to his Majesty's subjects to sail without convoy, and had rendered insurance upon such ships void, if they did sail without convoy, with an exception however of "*any ship or vessel, not required to be register-*" *ed*," and the cause therefore depended upon determining whether or no the ship *Lucy* was a ship required to be registered. The noble Lord who then presided in the Court of Common Pleas, delivered the [56] opinion of the Court in the negative in a very elaborate argument, in which the principles and provisions of these statutes are commented upon and explained with all the depth of research and acuteness of penetration, that characterize his Lordship's mind. The result of his Lordship's reasoning, as expressed in his own words, is this: "A *British* owner of a *foreign-*" *built* ship may engage in *neutral* trade, and will be "liable to the *alien* duties; but it was not the policy of "the Legislature to prevent *British* subjects from em-" ploying *foreign* ships in *neutral* trade, in as ample a "manner as they can be employed by *aliens*." (1)

(*k*) *Sections* 1. 4. 6. This act expired on the signing of the preliminary articles of the last peace.

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(1) The act of the U. S. has no prohibitory provision, and therefore the principle of this case is undoubtedly applicable to American owners of foreign built ships. Ships so owned, are entitled to receive from the custom house a document for their protection. called a certificate of ownership, and are entitled to certain privileges by the express enactments of the legislature. See Act, 14. April, 1802. ch. 26. 6 U. S. L. 72. Act, 2. March, 1803. ch. 69. 6 U. S. L. 219. This certificate of ownership is sometimes called a *sea letter*, but that term seems most correct-

24. The statutes require the officers to make a registry *de novo*, and to grant a new certificate, in *five* cases: *First*, where the old certificate has been lost or mislaid (*l*); *Secondly*, where the certificate is wilfully detained by the master (*m*); *Thirdly*, where, after a transfer of part of the property in the same port, the owners of the part not transferred desire a new registry (*n*); *Fourthly*, where the ship is altered in form or burthen (*o*); and, *Fifthly*, upon any transfer of property to another port (*p*). The statute of *King William* also required a new register in case of a change of the ship's name (*p*), but this change is now altogether prohibited (*q*). In cases not allowed by the statutes a new register ought not to be granted; and, there- [57] fore, where the commissioners of the customs re-

(*l*) 26 *Geo.* 3. *c.* 60. *s.* 22.
(*m*) 28 *Geo.* 3. *c.* 34. *s.* 14.; 34 *Geo.* 3. *c.* 68. *s.* 19.
(*n*) 34 *Geo.* 3. *c.* 68. *s.* 21.
(*o*) 26 *Geo.* 3. *c.* 60. *s.* 24.
(*p*) 7 & 8 *Will.* 3. *c.* 22. *s.* 21.
(*q*) 26 *Geo.* 3. *c.* 60. *s.* 19. The stat. 34 *Geo.* 3 *c.* 68. *s.* 22. appears to provide for another case. See before p. 53.

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ly applied to the *sea letter*, prescribed by our treaties with foreign powers, *eo nomine*, although in our act of 1st June, 1796. ch. 45. 3 U. S. L. 356. it is denominated a *passport*. And a question has arisen upon a policy of insurance, where a ship sailed with a *certificate of ownership*, and the policy contained a warranty that the ship sailed with a *sea letter*, whether such certificate was a compliance with the warranty. The Supreme Court of New York held that it was not, because a *sea letter* was a document known and prescribed by treaties with the U. S., and no parole evidence could be admitted to shew that in common parlance, it was understood to be a certificate of ownership. This decision howe ver was reversed by the Court of Errors. Sleght, &c. v. Hartshorne and Rhinelander, &c. 1 John. Rep. 192. 2 John. Rep. 531.

fused to order a new one to be made, upon the application of certain insurers, to whom a major part in value of a ship had been assigned upon abandonment thereof to them, the owner of the remaining part, who was not the master, having obtained possession of the certificate and refused to produce it, or allow an indorsement of the transfer to be made upon it; the Court of King's Bench held the refusal of the Commissioners to be just (*r*).

25. A bill of sale from the original builder to the first purchasers of a new ship, need not contain a recital of a certificate of registry (*s*), nor can properly do so, because regularly the ship is not to be registered until it comes to their hands, although they must cause it to be registered before the commencement of a voyage.

Upon the legislative provisions relating to subsequent transfers of the property, the following cases have been decided.

It was decided not long after the passing of the statute of the *twenty-sixth* year of the present reign, that a bill of sale, absolute upon the face of it, although in reality intended only as a security for the pay-
[58] ment of a promissory note, made while the ship was at sea, and not containing a recital of the certificate, was for that reason absolutely void; and that, although the grand bill of sale was delivered at the time of the transaction, and the person to whom the transfer was made, took possession of the ship, as soon as she returned to this country, yet the assignees under a commission of bankrupt, which had issued in the

(*r*) *The King v. The commissioners of the Customs*, upon an application for a mandamus to them to order a register *de novo*, Mich. T. 42 *Geo.* 3.

(*s*) *Oxenham v. Gibbs & another*, in B. R. Trin. Term 1807.

meantime against the original owner, were entitled to the ship, and the vendee had not even a lien upon it, either legal or equitable, to secure the payment of the note (*t*). The contents of the certificate might have been learnt at the Custom House.

26. But where a bill of sale of a *prize* ship was made while the ship and the certificate of registry were *at sea;* and in the recital of the certificate in the bill of sale, the sentence of condemnation was said to be dated on the 28th day of *May* 1783, and the certificate of freedom granted on the 23d day of *January* 1783, which agreed with an abstract of the register in one of the offices at the Custom House, from which the recital was taken, but differed from the certificate itself, and from the abstract of it in three other offices at the Custom House, in all of which the sentence of condemnation was said to be dated, as in truth it was, on [59] the 28th day of *May* 1782: the Court held, that this misrecital thus occasioned did not vitiate the bill of sale, the mistake being evident from a comparison of the dates; it being impossible that the ship should have been made free before condemnation. And Lord *Kenyon* added, "even supposing the parties had had an "opportunity of seeing the original certificate, it is too "much to say, that a mere clerical mistake should ren- "der it null and void (*v*)."

27. On the other hand, where in the recital of a certificate the word "*oath*" was used instead of "*affirmation*," "*sworn*" instead of "*affirmed;*" the allegation that another part-owner was not resident within

(*t*) *Rolleston & others v. Hibbert & others*, Mich. T. 30 *Geo.* 3. 3 Ter. Rep. in K. B. 406. and *Hibbert & others v. Rolleston & others*, 3 Bro. Ch. Ca. 571.

(*v*) *Rolleston & others v. Smith* 4 Ter. Rep. in K. B. 161.

twenty miles omitted; and the name of the *Master* changed; although the date of the registry and condemnation, the name and dimensions of the ship, and other particulars, were truly stated, the bill of sale was held clearly to be void (*u*).

28. *a*. It has been decided, however, in a case (*x*), which depended upon the construction of the statute of the *twenty-sixth* year of the present reign, that the indorsement, which that statute requires to be made on the certificate of registry, need not be recited in a bill of sale of the ship. Indeed neither that statute, [60] nor the statute of *King William*, expressly rendered such indorsement essential to the validity of a transfer of the property as between the parties, although the ship might be liable to forfeiture for the omission of it: which defect, as we have already seen, is supplied by the last statute (*y*); but even this statute does not require the indorsement to be recited in the bill of sale, nor can it, when it relates to the same transfer, properly be recited; because it is in its own nature subsequent to the execution of the bill of sale. It will, however, be always prudent, although perhaps not essentially necessary, to recite in a second, and every subsequent bill of sale, the indorsement made in pursuance of every previous transfer.

28. *b*. The only cases in which the Legislature has limited a time for complying with any of the requisites of the statutes, are, the residence of the owners out of the King's dominions under certain circumstances (*z*), and the ship's being at sea, or absent from her port, so

(*u*) *Westerdell v. Dale*, 7 Ter. Rep. in K. B. 306.

(*x*) *Cappadose v. Codner*, 1 Bos. & Pul. 483.

(*y*) 34 *Geo.* 3. *c.* 68. *s.* 15. ante, page 46.

(*z*) 34 *Geo.* 3. *c.* 68. *s.* 17, ante, page 50.

that an indorsement on the certificate cannot be immediately made (*a*). In the latter case, the indorsement must be made, and a copy thereof delivered to the officers within *ten* days after the ship's return to the port to which she belongs; and although on some of the *ten* days, and even on the *last* of them, being [61] holidays, no business be done at the Custom House, still, if the limited time be suffered to expire, the property will not pass, notwithstanding the indorsement be made, and the copy delivered on the next day of business (*b*). In the cases, in which no time is fixed by the Legislature, the property will not vest in the vendee under a bill of sale, until the requisites of the statutes are complied with: and if, between the execution of the bill of sale and such compliance, the interest of a third person takes effect, as in the case of the bankruptcy of the vendor, the transfer will be wholly void. And, therefore, in a case where one *Kirkpatrick* executed to *Charnock* a regular bill of sale of two-third parts of the vessel then at sea, and became bankrupt before *Charnock* delivered a copy thereof to the officers of the customs at the ship's port of registry, although this was done soon after the bankruptcy, and a regular indorsement made on the certificate, and notice thereof duly given within *ten* days after the ship's return, the assignees recovered the bankrupt's share from *Charnock*, who had obtained possession of the ship. In this case it was contended, on the behalf of *Charnock*, that a reasonable time for complying with the requisites ought to

(*a*) 34 *Geo.* 3. *c.* 68. *s.* 16, ante, page 49.

(*b*) *Gillespey & others v. Mestaer*, Guildhall Sit. after T. T. 1804. before *Lord Ellenborough*, Ch. Justice. For a further account of this cause, and other points connected with it, *See Sections* 32. & 33. of this chapter.

be allowed; and that when they were complied
[62] with, the sale should relate back to the time of
the execution of the bill of sale, and take effect from thence. But the Court held otherwise, and Mr. *Justice Lawrence*, in delivering the judgment, said, "The public will be most effectually served by holding, "that no interest shall pass from any owner in *British* "ships to any other, until the public has that informa- "tion which is so essential to its commercial welfare: "and the objects of the parties to such contract will be "best consulted by allowing the longest time to comply "with the requisites of the act, so as that, which was "meant to operate as a certain means of compelling "men to give that information, be not destroyed or "weakened. And this will be done by construing the "statute as enacting, that no bill of sale or other instru- "ment shall have any operation or effect, until the re- "quisites imposed on the parties to the sale are com- "plied with; and by not allowing any relation to hold "good, so as to make the conveyance effectual from "any antecedent time (*c*)."

I apprehend the learned Judge must be understood to speak, with reference to the facts of the case before the Court, of such requisites only as *may*, according to the circumstances of the transaction, be immediately complied with: and did not mean to intimate, that if *Charnock* had delivered a copy of his bill of sale to the officers *before* the bankruptcy of *Kirkpatrick*, so as to have enabled them to make the proper in- [63] dorsement on the affidavit, he would not thereby have acquired an inchoate title, which might have been perfected by the indorsement made on the certificate within ten days after the ship's return.

(*c*) *Moss & others v. Charnock*. 2 East. 399.

But although no time is prescribed for making the indorsement upon a transfer of property in the ship's port, yet it must be made while the certificate continues to be a subsisting operative instrument. And a person, who having purchased a ship under a regular bill of sale, instead of taking the proper indorsement, delivered up the certificate itself to the officers, by whom it was cancelled, and a new register granted, was held not to obtain a good title through the medium of an indorsement made three years afterwards on the cancelled instrument, though dated within a few days of the bill of sale (*d*).

23. *c.* It has been already mentioned, that, when the property of a ship is transferred to another port; a new register may be granted (*e*). In such a case, however, the new register alone will not be sufficient to give validity to a bill of sale: such other of the legislative requisites, as are applicable to the case, must also be complied with. This point was decided in the following cases. One *Ward* (*f*), being the sole owner of the ship *Fishbourne*, belonging to the port of *Newcastle* and registered there, sent the ship on a voyage to the *Baltic*, and while she remained there under the restraint [64] imposed by the late Emperor of *Russia*, made a bill of sale of one-third part to *Heath*, who immediately delivered a copy of the bill of sale to the officers of the customs at *Newcastle:* the officers caused an entry thereof to be indorsed on the affidavit upon which the original register was obtained, and a memorandum to be made in their books of registers (*g*), but

(*d*) *Moss & another v. Mills & another*, 6 East. 144.

(*e*) 7 & 8 *Will.* 3. *c.* 22. *sect.* 21. ante, page 56.

(*f*) *Heath v. Hubbard*, 4 East. 110.

(*g*) According to 34 *Geo.* 3. *c.* 68. *sect.* 16. ante, page 49.

by accident omitted to give notice thereof to the commissioners at *London*. After this, and during the absence of the ship, *Ward* made a bill of sale of the whole ship in consideration of 4,000*l*. to *Hubbard*, who resided at *London*, and the ship afterwards coming to the port of *London*, *Hubbard* obtained a new register in that port, and sold the ship there; but he did not send a copy of his bill of sale to the officers of the customs at *Newcastle*. *Heath* brought an action against *Hubbard*, and obtained judgment against him for the amount of one-third of the money received by the latter on the sale: the Court being of opinion that *Heath*, who had done all that the statutes required of him, the ship not having returned to *Newcastle*, had acquired a property under the bill of sale to him, and that the bill of sale to *Hubbard* was void, by reason of his omission to send a copy thereof to the Custom House at *Newcastle*.

Soon after this decision, some of the assignees of *Ward*, who had become a bankrupt, brought an action against *Hubbard* (*g*) to recover the value [65] of the remaining three-fourths of this ship; the validity of the sale to *Hubbard* was again argued; and it was contended, that as the *entire* interest in the ship was sold during her absence from her port, to a person residing at another port, which was become her home, the new register at that port was sufficient without any notice of the sale to the officers at *Newcastle*. But the Court held these measures to be necessary in the case both of an entire and partial transfer of property made

(*g*) *Bloxam & others v. Hubbard*, 5 East. 407. A third action was brought by the person claiming the remaining interest in this ship. The facts were stated in a special verdict, and the case argued in the Exchequer Chamber in T. T. 1807. The Court directed a second argument.

while a ship is at sea. In a subsequent case (*h*) also, the effect of a new register obtained in a port, to which a ship had been transferred, was again brought under the consideration of the Court of King's Bench, and it was again decided, that such new register would not supply the want of a compliance with the statutes of the present King. One *Fairless*, who resided at *Bishop Wearmouth* in the county of *Durham*, being the sole owner of a ship belonging to and registered in the port of *Sunderland*, on the 31*st* of *August* 1805 sold the ship, which was then in the port of *London*, for a valuable consideration, to persons residing in *London*, and executed a regular bill of sale thereof, and made the requisite indorsement on the certificate of registry. No copy of the bill of sale, or indorsement, was delivered [66] to the officers of the customs at *Sunderland*: but on the 9*th* of *September* following the vendees exhibited the bill of sale to the officers of the customs at *London*, and delivered up to them the certificate of registry with its indorsement, and obtained from them a new register in their own names. The officers at *London* gave immediate notice of this transaction to those at *Sunderland*, who made an indorsement on the oath there, purporting only that the ship had been registered anew in the port of *London* on the 9*th* of *September* 1805. The ship was afterwards employed as belonging to the port of *London*. On the 29*th* of *September Fairless* became a bankrupt, and his assignees afterwards brought an action against the vendees to recover the value of the ship. On behalf of the vendees it was contended, that this case was out of the provisions of the late statute, and was provided for only by

(*h*) *Hayton & another v. Jackson & another*, 8 East. 511.

the statute 7 & 8 *Wm.* 3. *c.* 22. *s.* 21. which requires a new registry upon the transfer of property to another port; and that as such new registry had been obtained, the title of the vendees could not be impeached. It was argued that the *sixteenth* section of the 26th *Geo.* 3. *c.* 60. and the *fifteenth* section of the 34th *Geo.* 3. *c.* 68. are both confined to transfers of property made *in* the port to which the ship belongs, and that the *sixteenth* section of the last mentioned statute is confined to a transfer made while the ship is so absent, as to render it impossible to make an indorsement on the certificate of registry. But the Court held that these two sections were intended by the Legislature to embrace [67] every case, and therefore as the parties had not complied with either of them, their title was bad, and the assignees of the bankrupt entitled to recover (*h*).

It is obvious, that if a valid transfer could be effected by means only of a new register granted to a vendee at a different port, without any entry made in the register-books of the ship's original port, that notoriety, which the Legislature has laboured to enforce, would not be obtained, and frauds might be practised, because the port of the original registry is the only place, to which a person desirous of obtaining information, can be expected to resort.

(*h*) In the 16th *sect.* of the 34 *Geo.* 3. *c.* 68. the Legislature appears to have contemplated the case of a ship's probable return to her port, because an indorsement is required to be made on the certificate within *ten* days after the ship's return. *Quere*, whether the most correct mode of proceeding, if the ship be transferred to another port, be not to deliver a copy of the bill of sale and indorsement to the officers at the ship's original port, that the proper entry may be made there, and also to exhibit the bill of sale, and deliver up the certificate to the officers at the new port, and obtain a new register from them?

28. *d.* The requisites of these statutes are of two kinds; one to be performed by the parties to the contract; the other, by the public officers. An omission by the latter of a matter required to be done by them, although it may unfortunately mislead the public, will not invalidate a transfer of the property (*i*).

[68] 28. *e.* In the case of the ship *Fishbourne* just quoted (*k*), *Ward* had, at the time of the ship's sailing for the *Baltic*, insured one-third part for 2,000*l.* with a club of underwriters at *South Shields*, by a policy in which the ship was valued at 6,000*l.* Upon receiving intelligence of the ship's detention in *Russia*, he abandoned the third to the underwriters, who paid him as for a total loss, and he then executed the bill of sale to *Heath*, which contained a recital of the facts, and was expressed to be made to him in trust for all the underwriters on the ship, by the policy before mentioned, without naming any of them; it was contended on the part of *Hubbard*, the subsequent purchaser, that this bill of sale, being made in trust for persons not named, was void in law, as tending to defeat the provisions and policy of the register-acts, directed to the ascertainment of the true owners and to the exclusion of foreigners. But the Court was of opinion, upon a full consideration of the case, that, supposing the bill of sale to be void, it was at most void only as to the objects of the trust, and so that the execution of the trust could not be enforced by law; but that there was no such illegality affecting the trustee himself, as would prevent the property from vesting in him in the first instance.

(*i*) *Ratchford v. Meadows*, 3 Esp. N. P. Ca. 69. *Heath v. Hubbard*, 4 East. 110.

(*k*) Ante, page 63.

28. *f.* It is observable, that in this case, the trust for the benefit of the unnamed underwriters was to arise, if it could exist at all, out of the acts of the parties, and from a conveyance adopted by them [69] for the security of their interest. There are various cases of trusts implied by law, which may admit of a consideration very different from that, which the Court seemed disposed to give to the case of these underwriters. I am not aware of any determination upon such an implied trust. There is indeed one reported decision (*l*), of a question between the separate creditors of a bankrupt, the sole registered owner of certain ships, and the joint creditors of the same bankrupt, and his deceased partner in trade, as to the equitable property. The ships had been bought by the bankrupt with the partnership money, but without the knowledge of his partner, and afterwards made a part of their joint property, though continued in his single name, in order to evade the provisions of a particular Act of Parliament affecting his partner. The Lord *Chancellor* decided upon the particular circumstances of the case, that the ships were to be considered as the sole property of the bankrupt, saying at the same time, "I desire it "to be distinctly understood, that I give no opinion "whatever upon the effect of those two Acts of Parlia- "ment (namely the Register Acts) in cases of trusts "implied by law, and not arising out of an act, in which "the contracting parties join. It is unnecessary to say "any thing upon that farther, than that, in a great va-
"riety of cases, the interests of mankind would
[70] "require the Court to consider long, before they
"should say those statutes would prevent trusts

(*l*) *Curtis v. Perry*, 6 Ves. Jun. 739.

"implied or arising by operation of law." And it has been since solemnly decided, that these statutes, which plainly apply to, and are intended to regulate the acts of the parties, do not affect a transfer made by the commissioners to the assignees of a bankrupt (*m*). (1)

The necessity of a written contract, containing a recital of the certificate of registry, to give effect to an agreement for the sale of property in a ship, has also been acknowledged in the Court of Admiralty, in a suit instituted by the majority of part-owners against the master, who was also a part-owner, for possession of the ship. One of the grounds upon which the master resisted the application, was an agreement alleged to have been made with an agent of some of the part-owners for the purchase of their shares, which would give a majority of interests to him; as to which the learned judge declared, that he thought the Act of Parliament made it impossible for the Court to recognize such a transaction (*n*).

29. A compliance with these legislative regulations, is of the utmost importance to every person intending either to part with, or to acquire, property in a *British* ship; because the register and the certificate thereof are, in many cases, conclusive evidence of title to the

(*m*) *Bloxham and others v. Hubbard*, 5 East. 407.

(*n*) The New Draper, *Walker*, 4 Rob. A. R. 287.

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(1) Quere, whether the registry acts apply to the case of an abandonment on a policy of insurance? There does not appear to have been a bill of sale, &c. in Leatham v. Terry (3 Bos. & Pul. 479.) until the underwriters actually sold the ship. See the opinion of *Kent J.* in United Insurance Company v. Scott, &c. 1 John. Rep. 106.

property. This has been decided in one case, where a beneficial interest was claimed, and in an- [71] other, where a charge was imposed.

Thus, in an action on a policy of insurance on freight, where the interest in a ship and its earnings was alleged to be in four persons, who were partners in trade, two only of whom were named as owners in the register, it was decided, that the action was not maintainable, the property being in law vested in those two only, although it was proved as *a fact*, that the ship was paid for by all the four partners (*o*). (1)

(*o*) *Camden v. Anderson*, 5 Ter. Rep. K. B. 709.

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(1) So in a case of possession, the Court of Admiralty decided the title to the person, who was the legal owner in possession of the bill of sale, in opposition to an asserted *equitable* interest in others. The circumstances of the case were as follows: A ship was purchased by one Charnock, under a sale of the marshal of the Court, and it being in possession of one Tubbs, his action was brought to recover possession. Charnock had possession of the bill of sale, and alleged that he had never transferred the possession of her to any person. Tubbs claimed the ship, deriving a title from one Kirkpatrick, for whom he alleged Charnock purchased the ship as agent. It appeared in evidence that the purchase had been really made for Kirkpatrick, and that a delivery of the ship had been made by Charnock, to a person sent by Kirkpatrick, but that Charnock always retained the legal title; and nothing appeared to shew conclusively, that he meant at all events, to consider the property as Kirkpatrick's; but the delivery was only for the purpose of executing a particular contract, which however never was executed. Sir *W. Scott* said, "This question arises on the arrest of a ship, which "had been sold under the authority of this court to Mr. Char-

And again, where an action (*p*) was brought by a shipwright, for repairs made by the order of one *Wharton*, to a ship which had formerly belonged to, and been properly registered in the names of *Wharton* and of the defendant, but of which the defendant, before the repairs were ordered, had executed an absolute bill of sale of his share to *Wharton*, in which the certificate was not truly recited, and which, on that account, was held to be void; and of which share *Wharton*, had also executed a mortgage to the defendant, by a deed alike inaccurate and void; and *Wharton*, remaining in possession of the whole, as apparent sole-owner, had ordered the repairs in question, and after they were made, sold the ship by valid instruments to the defendant and others; the Court, without entering into the question, whether a mortgagee, not in possession, was [72] chargeable with the expence of repairs, held, that the defendant, who remained a part-owner of the ship at the time of the repairs, notwithstanding his attempt to transfer his interest in it to *Wharton* by the void bill of sale, was answerable for the repairs ordered by the other part-owner *Dale*.

(*p*) *Westerdell v. Dale*, 7 Ter. Rep. K. B. 306. The defendant had not pleaded in abatement.

" nock. He is in possession of the bill of sale, and this court " is called upon to maintain a title acquired under its own pro- " ceedings. Whether Charnock purchased as a trustee for a- " nother, or under what private understanding, it will be un- " necessary to inquire. The legal interest, which is establish- " ed before the court on his part, excludes all considerations " of other equitable titles, which if they exist, must be left to " be enforced in other courts." The Sisters. 5 Rob. Adm. " Rep. 138. [155] S. C. 4 Rob. Adm. Rep. 275.

In a subsequent case(*q*), it appeared, that the owners of a schooner having, by a regular bill of sale, conveyed it to a purchaser for a valuable consideration, and made the proper indorsement on the certificate of registry, delivered the vessel and the bill of sale to the purchaser, but the purchaser did not deliver a copy of the indorsement at the Custom House until near a month afterwards, and their names remained on the registry there during that time; this, however, did not appear to be with their concurrence. During that time the master, by the order of the purchaser, took the vessel to a shipbuilder to be repaired for an outward voyage, who repaired it accordingly; and afterwards brought an action against the former owners for the price of the repairs. And on his behalf it was contended, that they were answerable, because they were the legal owners at the time of the repairs; but it was held that they were not answerable, as the order was given by a mere stranger, and not for their benefit, but his own.

30. And, notwithstanding the documentary evidence of title furnished by these statutes, possession of a ship and acts of ownership are in this, as in other [73] cases, presumptive evidence of title. Thus, in an action(*r*) on a policy of insurance effected upon the ship *Chesterfield*, while absent on a foreign voyage, wherein the interest in the ship was alleged to be in *Robertson* and *Walker*, and in which it became a question, whether that allegation was sustained upon the evidence given in the cause, Lord *Ellenborough*, the Chief Justice of the King's Bench, in delivering the opinion of the Court on this point, expressed himself as

(*q*) *Young & another v. Brander & another*, 8 East. 16.

(*r*) *Robertson & another v. French*, 4 East. 130. And see to the same effect, *Thomas & others, v. Foyle*, 5 Esp. N. P. Ca. 88.

follows: "As to the first point made in this case, on "the part of the defendant, viz. that the ownership al- "leged was not sufficiently proved: it was proved by "the captain *(Brooks)* in the ordinary way, that the "owners by whom, as such, he was appointed and em- "ployed, were the persons in whom the ownership is "by the declaration averred to be. And though it "afterwards appeared by his answers, on cross-exam- "ination, that the ownership was derived to those per- "sons under a bill of sale, executed by himself, as at- "torney to one *Lawrence Williams*, the former owner, "it did not on that account become necessary for the "plaintiffs to produce that bill of sale, or the ship's reg- "ister, or to give any further proof of such their prop- "erty; the mere fact of their possession as owners "being sufficient *primâ facie* evidence of ownership,

"without the aid of any documentary proof of
[74] "title deeds on the subject, until such fur-
"ther evidence should be rendered necessary in "support of the *primâ facie* case of ownership which "they made in consequence of the adduction of some "contrary proof on the other side. No such contrary "proof was, however, in this case, given on the part of "the defendant. For the prior register in the name of "*Lawrence Williams*, as owner in 1799, and a subse- "quent register to the same person upon a sale at the "*Cape*, in 1802, under a decree of the court of Vice- "Admiralty, and which were given in evidence by the "defendant, were perfectly consistent with a title in oth- "er persons *in the meantime*, agreeable to the averment "in the declaration." (1)

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(1) But the production of the register from the Custom House, is conclusive evidence as to ownership at the time;

31. Where the Court of Admiralty entertains a suit for the possession of a ship, that Court will, if necessary, issue process to compel the person, who may be in possession of the register, to bring it into Court. In a suit lately instituted on a bottomry bond, such process was issued against one, who detained the register under a sale alleged to have been made to him by the original owner, but which seems to have been considered as a fraudulent sale, made for the purpose of defeating the bond. He returned to the process, that the register had been deposited in the hands of another; a similar process was then issued to the person named in this return, upon which the register was delivered up (*s*).

32. In the cases hitherto quoted, it has not ap- [75] peared that the failure of compliance with the legislative provisions was attributable to the misconduct of the vendor; and in the case (*t*) in which a court of equity was held incompetent to give relief against the rigour of the law, the defect was in the bill of sale itself, which was therefore not less void in a court of equity, than in a court of law. If after the execution of a regular bill of sale by the vendor of a ship at sea, and the delivery of a copy thereof to the proper officer, as required by the Act, the vendor should wrongfully refuse to make the necessary indorsement within *ten* days after the ship's

(*s*) The BARBARA, *Chegwin*, 4 Rob. A. R 1.

(*t*) *Hibbert v. Rolleston*, 1 Bro Ch. Ca. 571. ante, p. 58.

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and it being proved in an action on a policy of insurance, that the ship, at the time of the insurance, was registered at the custom house, in the name of another person as owner. *Le Blanc J.*, at Nisi Prius sittings, held that the title was incontrovertible, and nonsuited the plaintiff. Marsh v. Robinson. 4 Esp. N. P. Cas. 98.

return to her port, a very important question, for the determination of a court of equity, would arise. It is obvious that there would, in this case, be an instrument valid in its original formation, and at least a tacit engagement by the vendor, to do what should be afterwards necessary to perfect the transfer; and the question seems to be, whether, notwithstanding the statute enacts that the bill of sale shall be void if the indorsement be not made within the time prescribed, a court of equity can act upon it so far as to compel the vendor, or those who may represent him, to execute a new conveyance, to be followed up by all the requisite proceedings, so as to give a new title from that time? This question has indeed been brought before a court [76] of equity (*v*), where its difficulty and importance were acknowledged. The case in which it arose was at length settled by a compromise among the parties, and no final decision took place; but, it appears to have been the opinion of *Lord Chancellor Eldon*, from which *Sir William Grant*, the Master of the Rolls, did not dissent, that the Court might aid the vendee, by making a decree for a new conveyance.

Messrs. Beatsons, being owners of certain shares of the ship *Atlas* of *London*, which was absent on an *East India* voyage, in the month of *July* 1803, executed to Mr. *Mestaer* a regular bill of sale of their interest in the ship, and its freight for the voyage, of which a copy was duly delivered at the Custom House. The consideration expressed in the deed was 11,000*l.*, therein stated to have been paid by him to them; but it seems,

(*v*) *Mestaer v. Gillespie & others*, 11 Ves. Jun. 621. The report of this case well deserves the attention of professional readers. The account of the facts and proceedings given in the text is taken partly from Mr. *Vesey's* Report, and partly from the notes of one of the counsel engaged in some of the proceedings.

in truth, to have been the furnishing them with his acceptances to the amount of 7,000*l.*, and 4,000*l.* previously due to him on a prior account, for which they had accepted bills; and the present bill of sale was a substitution for a prior security, that had not been carried into effect. The ship returned to her port on the 17th of *December;* at that time, several bills of each party were over-due and dishonoured, and an action had been brought against both parties upon one of them. Mr. *William Beatson*, who managed the [77] business, insisted upon being allowed to receive the first instalment of the freight to discharge some of the bills, and for other purposes: this created a delay; but on the 22d of the month the parties, who were all aware of the necessity of making the indorsement within *ten* days, came to an agreement; and, on the 23d, they both applied to one *Musgrave*, who was the master, and also a part-owner, to bring the certificate to the Custom House the next day (*u*), that the proper indorsement might be made upon it: this *Musgrave* omitted, but the reason for his omission did not appear. The 25th and three following days were holidays at the Custom house: on the 29th, the indorsement was made. The *Beatsons* soon afterwards became bankrupts, and their assignees commenced an action at law against *Mestaer*, for the recovery of the shares conveyed to him, in which they succeeded (*x*). Upon this, *Mestaer*, filed a bill in the Court of Chancery, praying that the assignees might be restrained from taking out execution on their judgment obtained in the action at law; that an account

(*u*) I do not know why this was required. It would have been sufficient to have made an indorsement on the certificate in his hands, and to have delivered a copy of it at the Custom House, without taking the certificate to the office.

(*x*) Ante, p. 60.

might be taken of the money due to him; and the *Beatsons'* shares in the ship sold, and all necessary parties join in the sale; and that his debt might be paid out of the produce of such sale and the freight, and the *East India* Company be restrained from paying [78] the freight without the order of the court. The case was twice argued upon a motion for the injunction, and for payment of the freight into Court, first before the Lord *Chancellor* alone, and afterwards before his Lordship, assisted by the *Master of the Rolls*; and an order was made to stay the execution at law, to bring the freight into Court, and to go to trial upon the following question; viz. "Whether *Mestaer* had been "wilfully prevented by *William* and *John Beatson*, and "*Musgrave* (the master), or any or either of them, from "procuring an indorsement on the certificate of regis-"try?" It should be observed, that both the learned Judges considered such an order to be proper as an *intermediate* proceeding, to secure the interests of *Mestaer*, and to ascertain the nature of the transaction; reserving the ultimate decision of the question until the fact should be ascertained by the verdict of a jury, and the cause finally heard according to the practice of the Court. The question thus directed was tried before the Chief Justice of the Court of King's Bench and a special jury (*y*). *William Beatson* was the only person examined at the trial, and the facts before stated form the substance of his testimony. The learned Chief Justice expressed his opinion to be, that if *Wm. Beatson* had in fact at all prevented *Mestaer* from obtaining the indorsement, such prevention was wrongful, because it

(*y*) *Mestaer v. Gillespie & others*, Guildhall Sit. after Mich. Ter. 1804.

appeared that he had annexed to his signing the indorsement, a condition not found in the bill of [79] sale. The consideration mentioned in that instrument was money paid; if the bills accepted by *Mestaer* were not paid, the *Beatsons* should have resorted to their action upon them against him. The acceptance of bills appeared to have been the original contract between the parties. And he added, that *Musgrave* also appeared to have prevented *Mestaer* from obtaining the indorsement, for it was his duty to have attended with the certificate on the 24th, and no reason appeared for his omission (*z*). The jury declared by their verdict, that *William Beatson* and *Musgrave* had wilfully and wrongfully prevented *Mestaer* from obtaining the indorsement. After this verdict, the cause was again argued in the Court of Chancery, but ended in a compromise, as I have already mentioned. It should be noticed, that the bankruptcy of Messrs. *Beatsons* was not thought of importance, but their assignees were considered to be in the same situation as they would have been if it had not happened.

33. Another question in the before-mentioned case, arose upon the validity of the assignment of the freight, which, as already observed, was comprised in the bill of sale of the ship. It was contended by the [80] assignees of *Messrs. Beatsons*, that the assignment of the freight was within the Act of Parliament, for otherwise its principal object might be defeated, by giving foreigners a beneficial interest in *British* ships; and further, that as both ship and freight were

(*z*) This point was not contested. *Quere*, if *Musgrave* was bound to attend at the Custom House? See the note, ante page 77. The parties did not desire to make the indorsement on the instrument on board the ship in his hands: but seem to have thought it necessary that it should be taken to the Custom House.

assigned by the same deed, the deed was by the terms of the statute become equally void as to both. The *Lord Chancellor*, however, seems to have been clearly of opinion, that an assignment of freight was not within the provisions of these statutes, and that, if the assignment in this case had been made by a separate instrument, it would certainly have been good; and the inclination of his opinion was, that the bill of sale, though void as to the ship, of which it purported to make a legal transfer, might be a valid agreement in a court of equity with respect to the freight. This point, however, did not receive a final decision, for the reason before given.

34. The opinion of the *Lord Chancellor* in the case last quoted, upon the validity of the assignment of the freight, notwithstanding the bill of sale was become void as to the ship, supposing such an assignment not to be within the provisions of the Register Acts, appears to have been confirmed by a decision of the Court of King's Bench (*a*). A bill of sale of several registered ships was made by way of mortgage, for securing the payment of a sum of money lent to the owner, who, by the same deed, covenanted to repay the money on a particular day. The bill of sale did not [31] contain a recital of any of the certificates of registry. The money not being repaid at the day, the lender brought an action of covenant upon the deed. It was objected, that by force of the Act of Parliament (*b*), the deed was wholly void to all purposes, and, consequently, that an action of covenant grounded upon it could not be sustained, whatever other remedy the lender might have to recover his money: but the Court thought the object of the Legislature would be sufficient-

(*a*) *Kerrison v. Cole*, 8 East. 231. (*b*) 26 *Geo.* 3. *c.* 60. *s.* 17.

ly attained, and the words of the statute satisfied, by considering the statute to make void so much only of the instrument, as related to the conveyance of the property in the ships, without also avoiding a distinct and collateral covenant contained in it; and therefore determined, that the action might be maintained. This determination appears also to support the opinion of the *Lord Chancellor*, as to the power of a court of equity to decree a sale or new conveyance, in the case then before him.

CHAPTER THE THIRD.

OF PART-OWNERS.

1. THE several part-owners of a ship are tenants in common with each other of their respective shares: each has a distinct, although undivided, interest in the whole; and upon the death of any one, his share goes to his own personal representatives, and does not accrue to the others by survivorship. It is proposed to consider the nature of their interest, *first*, with relation to each other; and, *secondly*, with relation to strangers.

2. FIRST. A personal chattel, vested in several distinct proprietors, cannot possibly be enjoyed advantageously by all without a common consent and agreement among them: to regulate their enjoyment in case of disagreement is one of the hardest tasks of legislation; and it is not without wisdom, that the law of *England* in general declines to intefere in their disputes, leaving

it to themselves, either to enjoy their common property by agreement, or to suffer it to remain unenjoyed or perish by their dissention; as the best method of forcing them to a common consent for their common benefit. But of ships, "which are built to plough the sea, and not to lie by the walls," commercial nations [83] consider the actual employment as a matter, not merely of private advantage to their owners, but of public benefit to the state, and therefore have laid down certain positive rules in order to favour this employment, and to prevent the obstinacy of some of the part-owners from condemning the ship to rot in idleness. It sometimes happens, that several persons become part-owners in a ship under a fixed compact and settled agreement, among them for the employment of it, or that by common consent they delegate the management of their common concern to one of them, who by a very intelligible figure of speech is called the husband of the ship. When this is the case, nothing is left for the law of the state but to enforce the compact and agreement of the parties, according to its own mode of administering justice in analogous cases. It is only when the enjoyment of the property has not been thus settled by the parties, that it becomes necessary to enquire what mode the law of the country has prescribed for the regulation of it. Some foreign writers (*a*) on maritime law have laid it down as a rule, that if a ship is in need of repair, and one part-owner is willing to repair it, and another unwilling, he who is willing may repair it at their com-

(*a*) *Straccha de Nav. Pars.* 2. *Num.* 8. The author cites two others, who had written before him, and is as usual cited in his turn by *Roccus* and others, who have written after him. In the same passage he very gravely tells us, that ships often want repairs, and as gravely cites the Digest to prove his proposition.

mon expence; and if the other will not pay his [84] quota within four months, he shall lose his share in the ship: and they found their doctrine upon a passage in the Digest (*b*), in which the same opinion is delivered with regard to the repairs of a house. But I do not find this rule adopted in practice in any country, and in case of the poverty of the party it would be extremely cruel.

3. The ordinances of *Oleron* and *Wisbuy* are silent on this subject of disagreement among part-owners as to the employment of a ship. By the ordinance of the *Hanse Towns* (*c*), if the owners disagree as to the freighting of the ship, the most voices shall carry it, and yet the master may take money on bottomry for those who will not contribute their part to the outfit. The *French* ordinance (*d*) directs, that in all cases, which concern the common interest of the owners, the opinion of the majority in value shall be followed. The ordinance of *Rotterdam* (*e*) gives power to a majority possessed of above half the ship to let it out on freight, and to bind all the part owners thereby, and to raise money for the outfit, either by borrowing it on bottomry, or by disbursing for the shares of the other owners, who appear unwilling to contribute after due notice. And the same ordinance (*f*) even authorizes the [85] owners of above half the ship to sell it for the general account.

(*b*) *Dig.* 17. 2. 52. 10.

(*c*) *Art* 59. I have followed the translation given in *Malyne*. The words, as given in the *Us & Coutumes de la mer*, are "*le plus de trois* "*emportera sur les autres*" which *Cleirac* interprets to mean three more on one side than on the other.

(*d*) Liv. 2. Tit. 8. Des Proprietaires, Art. 5.

(*e*) *Art.* 172. 2 Magens 108. See also on this point *Weskett* on Insurance. tit. *Bottomry*, sect. 3 & 4.

(*f*) *Art.* 171. 2 Magens 108.

4. The law of this country appears to possess an important advantage over all the ordinances, that have been cited; because, while it authorizes the majority in value to employ the ship "upon any probable design," it takes care to secure the interest of the dissentient minority from being lost in the employment, of which they disapprove. And for this purpose it has been the practice of the Court of Admiralty from very remote times to take a stipulation from those, who desire to send the ship on a voyage, in a sum equal to the value of the shares of those, who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares (*g*). When this is done, the dissentient part-owners bear no portion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking; but the ship sails wholly at the charge and risk, and for the profit of the others (*h*). This security may be taken upon a warrant obtained by the minority to arrest the ship; and it is incumbent on the minority to have recourse to such proceed-
[86] ings, as the best means of protecting their interest; or, if they forbear to do so, at all events they should expressly notify their dissent to the others, and, if possible, to the merchants also, who freight the ship. For it has been decided (*i*), that one part-owner cannot recover damages against another by an action at law upon a charge of fraudulently and deceitfully sending the ship to foreign parts, where she was lost. And it has also been decided in the Court of Chancery, that one part-owner cannot have redress in equity against

(*g*) Form of such a security, Appendix No. VI.

(*h*) *Anon.* 2 Chan. Ca. 36. Trin. T. 32 Car. 2. and by *Holt Ch. J.* in *Boson v. Sandford*, Carth. 63.

(*i*) *Graves, v. Sawcer*, Sir T. Raym. 15. 1 Keb. 38. & 1 Lev. 29.

another for the loss of a ship sent to sea without his assent (*k*). These decisions are consonant to the general rule of law, that where one tenant in common does not destroy the common property, but only takes it out of the possession of another, and carries it away, no action lies against him; but if he destroys the common property, he is liable to be sued by his companion(1). And in a case tried before *Chief Justice King*, wherein it appeared that one part-owner had forcibly taken a ship out of the possession of another, secreted it, and changed its name; and that it afterwards came into the possession of a third person, who sent it to *Antigua*, where it was sunk and lost; the Chief Justice left it to the jury to say, under all the circumstances of the case, whether this was not a destruction of the ship by the means of the defendant; and they finding it to be so, the plaintiff recovered the value of his share.

The Court of Common Pleas afterwards approv- [87] ed of the direction of the *Chief Justice* (*l*). If a

(*k*) *Strelly v. Winson*, 1. Vern. 297. Skin. 230.

(*l*) *Barnardiston v. Chapman & another*, 1 *Geo.* 1. *Sir Peter King's Cases*, MS. The cause was twice tried: at the first trial a verdict was found for the plaintiff, subject to a case, which stated only the title of the parties, and that the defendants by force took the ship out of the plaintiff's possession, and carried it away. The case was argued at the chambers of the Chief Justice, before him, and *Tracy* and *Dormer*, Justices, and a new trial ordered by consent. The trial mentioned in the text was the *second* trial. A *third* trial was moved for and refused. A full note of this case is now printed in 4 East. 121.

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(1) And in Heath v. Hubbard, 4 East. 110. the Court intimated that a sale of the whole of a ship, by one who is a part-owner, in exclusion of the right of his cotenant, is not such a destruction of the ship, as would entitle the cotenant to an action of trover: and said that the contrary doctrine would be *extremely difficult* to be sustained.

part-owner expressly notify his dissent, the Court of Chancery will not compel him to contribute to a loss(*m*). If the minority happen to have possession of the ship, and refuse to employ it, the majority also may by a similar warrant obtain possession of it, and send it to sea, upon giving such security.

5. It was indeed formerly doubted in *Westminster Hall*, whether this practice of the Court of Admiralty was not an unfounded assumption of jurisdiction in a matter not within its cognizance, because arising at home and upon land; and in a case before the Court of Exchequer(*n*), in the reign of *Charles the Second*, *Chief Baron Hale* and the other Barons took time to [88] consider of the point, and it does not appear that any decision was then made upon it. In a case, which came before the Court of King's Bench (*o*) very soon after *Chief Justice Holt* presided there, it was held by that Court that the practice was unlawful, and the Chief Justice is reported to have said, that the majority would not be without remedy, as they might bring an action upon the case at the common law against the others for refusing their assent, and therein recover damages equivalent to the profits, which might have been made on the voyage. But the remedy thus proposed

(*m*) *Horn v. Gilpin*, Amb. 255. In this case it was said, that the ground of decision mentioned in *Vernon's* Report of *Strellyv. Winson*, *viz.* that recourse should have been had to proceedings in the Admiralty, is mistated there, and that the real ground of decision was, that the part-owner who complained had not *expressly* dissented.

(*n*) *Justice v. Brown*, Hil. T. 19. and 20 Car. 2. *Hardres*, 473. This was before the flame of jealousy, that once prevailed in Westminster Hall against the Courts at Doctor's Commons, had expired.

(*o*) *Knight v. Berry*. 1 W. & M. *Carth*. 26. *Comb*. 109 Rep. temp. *Holt*, 647. 1 Show. 13. The three first reporters say, a prohibition was granted; but from the report in *Shower* (who however says he did not take the case) the jurisdiction of the Court of Admiralty seems to have been admitted. This appears to be the same case as *King v. Perry*, 3 *Salk*. 23. in the report of which *Chief Justice Holt* is represented to say, that the stipulation in question *was* unlawful.

seems very difficult on account of the uncertainty of the profits to be made by a voyage, and wholly inadequate to the ends of public policy, as it leaves the ship unemployed. And accordingly there are several later decisions of the Courts at *Westminster Hall*, recognizing and confirming the jurisdiction of the Court of Admiralty, both as to the taking of such security, and enforcing the performance of the stipulation upon the loss of a ship. Two of these decisions took place, about eight years after the case, which I have last mentioned, and that case is not quoted in the report of either of them: one in the Court of King's Bench (*p*), but in the ab- [89] sence of *Chief Justice Holt;* the other in the Court of Common Pleas (*q*); in both of which the authority of the Court of Admiralty was acknowledged; within a few years afterwards however the same point again came before the Court of King's Bench (*r*) in two other instances, at the last of which the Chief Justice is reported to have been present, and the Court on both occasions directed the case to be put into a course of solemn decision; but nothing more is reported to have been done upon it. In the reign of *George the Second* another application was made to the Court of King's Bench, to stay proceedings instituted in the Court of Admiralty, to compel security to be given before the departure of a ship on a voyage, of which some of the part-owners disapproved; but the Court of King's

(*p*) *Lambert vs. Aeretree*, 1 Ld. Raym. 223. East. T. 9 W. 3. On a motion for a prohibition to the Admiralty on a suit there upon the stipulation.

(*q*) *Blacket v. Ansley*, 1 Ld. Raymn. 235. Trin. T. 9 W. 3. upon the like motion as the last case.

(*r*) *More v. Rowbotham*, 6 Mod. 162. East. T. 3. Ann. and *Degrave v. Hedges*, 2 Ld. Raym. 1285. East. T. 6. Ann, upon the same motion. The Court ordered the Plaintiff to declare in prohibition in both these cases.

Bench refused to do so (*s*). In the last case (*t*), which I find in the books on this subject, a part-owner, possessed of a small share, instituted a suit in the Court of Admiralty against the major part-owner, who was also master, and who insisted upon making a voyage [90] with the ship, praying that the ship might be sold, or the party have such other remedy as might be thought proper by the Admiralty; and the other applied to the Court of King's Bench to prohibit the Admiralty from proceeding in the suit; but *Chief Justice Lee* said, "I have no doubt but the Admiralty "has a power in this case to compel a security, and this "jurisdiction has been allowed to that Court for the "public good. Indeed, the Admiralty has no jurisdic- "tion to compel a sale, and if they should do that, you "might have a prohibition after sentence: or we may "grant a prohibition against selling, or compelling the "party to sell, or to buy the shares of others." This was agreed to by the whole Court, and the case ended by prohibiting the Court of Admiralty to direct a sale, but leaving the Court at liberty to compel security. By this determination the law appears to have been finally settled; but the progress of it may not have been uninteresting to the learned reader.

6. It does not appear that either of the cases, which I have just referred to, arose upon an equal division of voices or interests in the ship; but a learned Civilian (*u*), who wrote towards the end of the seventeenth century, having spoken of this power of the majority, adds, that

(*s*) *Dimmock v. Chandler*, 2 Stra. 890. Fitz. 197.

(*t*) *Ouston v. Hebden*, 1 Wils. 101. It does not appear by the report, that the Court of Admiralty was proceeding to direct a sale.

(*u*) *Godolphin*, in the introduction to his view of the Admiralty jurisdiction.

the same thing may also be effected by the one part only, in case of equality in partnership; this [91] doctrine is adopted by *Molloy* (*x*), and is followed in the practice of the Court of Admiralty (1).

7. We have seen, by the case just cited, that the Court of Admiralty cannot *in any case* compel any of the part-owners to sell his interest. The *French* Ordinance (*y*) prohibits one part-owner of a ship from forcing his companion to a sale (which by the *French* laws one tenant in common might in general do) except in case of equality of opinions upon the undertaking of a voyage. But a part-owner may by our law dispose of his interest to another person at any time; a rule better adapted to the present state of commerce than that (*z*), which formerly prevailed among some of the nations of the continent, and which did not permit the sale of a ship until after a possession of three or more years; or at least not till after the performance of one voyage at the charge and risk of the part-owners (*a*). The old rule

(*x*) Book 2. ch. 1 sect. 2. And see to the same effect *Cleirac's* note on the 59th article of the *Hanseatic* ordinance.

(*y*) Liv. 2. Tit. 8. *Des proprietaires*, art. 6.

(*z*) *Valin* on the French Ordinance, tom. prem. 683. *Loccenius* de jure Marit. lib. 3. cap. 5. sect. 3. *Consolato*, Cap. 54.

(*a*) *Molloy*, book 2. ch. 1. sect. 3.

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(1) And in the District Court of Pennsylvania, Judge Peters held that a majority in value of the owners might apply to the admiralty, to order the ship delivered to them, upon a stipulation being made, when the minority dissented from the voyage. And he said that it had not been judicially decided in the U. S., whether in such a case the minority might not be compelled to sell, and he seemed to consider it questionable, whether such a power was not vested in the admiralty. Willings, &c. v. Blight. 2 Peters. Adm. Rep. 288. and see also 2 Brown's Civ. and Adm. Law. 131.

appears to have been framed with a view to the interest of the master, who in former times was a principal owner, and was the person who, with the pecuniary assistance of the other owners, generally caused the [92] ship to be built in the expectation of being employed in the command; an expectation that might be defeated, if the others could sell their shares to strangers, who acquiring a majority of interest might appoint a friend of their own (*b*).

8. With regard to the repairs of a ship and other necessaries for the employment of it, one part-owner may in general, by ordering these things on credit, render his companions liable to be sued for the price of them (*c*). Yet if the person who gives the credit on such an occasion, does not at the time know that there are other part-owners, he *may* sue him alone, from whom he receives the orders (*d*). (1) But one part-owner cannot, by ordering an insurance of the ship without

(*b*) *Consolato*, Cap. 54.
(*c*) *Wright v. Hunter*, 1 East's Rep. 20.
(*d*) *Doe v. Chippenden*, Coram *Kenyon*, Ch. J. at *Westm.* Sit. p. H. T. 1790, upon a Plea in Abatement.

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(1) And persons, who become and act as part-owners, are liable to a tradesman for articles furnished, or work done on the ship afterwards, if they are charged *to the ship*, although the contract was made before they became part-owners. And therefore, where one Taylor built a ship, and while building, sold three quarters of her to Stanley and Carson, and continued ship's husband during the building and fitting out of the ship, and was paid by Stanley and Carson, their part of the disbursements, and the plaintiff, who was a painter, brought his action against all of them for work done on the ship; it appearing in evidence that Carson and Stanley had acted as part-owners, from the time of their purchase, and that the plaintiff, in his books, had debited his charges against the ship by name; the Court of Common

authority from another, charge the other with any part of the premium, unless the other afterwards assent to the insurance (*e*).

9. The interest of part-owners in a ship, and in the profits and loss of an adventure undertaken by their mutual consent, is not affected by the bankruptcy of one of them taking place after the commencement of the voyage, although he has not paid his full share of the out-fit. In such a case, if the other part-owners have in that character paid the expence of the [93] out-fit, or made themselves responsible for it, they will have a right to deduct his share from the portion of the profits to be paid to his assignees. But in a case, where the outfit had been conducted by a person appointed to manage the concern as purser or ship's husband, in pursuance of an agreement made by three others at the time of their becoming owners of the ship, and this person settled the accounts with them, and took from one of them, who afterwards became a bankrupt, promissory notes payable at a future day for a part of his share of the expence; it was determined, that the assignees of the bankrupt were entitled to receive his full share of the profits, and that the ship's husband must take a dividend under the commission for the amount of the notes. In this case the husband had after his appointment acquired an interest in the

(*e*) *Ogle & another v. Wrangham & others*, Coram *Kenyon* Ch. J. at *Guildhall* Sit. p. H. T. 1790. and *French v. Backhouse*, 5 Burr. 2727.

Pleas of Pennsylvania held, that the plaintiff was entitled to recover against all the owners, the amount of the work done after they became such avowedly, the presumption being that it was done upon their credit. Scottin v. Stanley, &c. 1 Dall. Rep. 129.

ship by purchasing a part of the share of one of the other part-owners; but his right as a part-owner does not appear to have been insisted upon: and indeed he had made the disbursements and managed the concern, not in the character of a part-owner but of an agent. After the bankruptcy had happened, the other two part-owners paid two-thirds of the amount of the bankrupt's notes to the ship's husband, and agreed with him to consider the bankrupt as interested only in the proportion, which the money he had paid bore to the whole cost and out-fit. But this transaction was held not to affect the question, nor alter the right or interest [94] of the bankrupt, or of the assignees, upon whom they had devolved (*f*).

It is observable that in this case, which was sent from the Court of Chancery for determination at law, the question was made and decided with respect as well to the value of the bankrupt's share in the ship itself, as to the profits of the adventure, without distinction; and it seems to have been considered that part-owners *might* have a lien on each other's shares of a ship, as partners in trade have on each other's shares of their merchandize. But I do not find this point to have been ever decided; and there is a material difference between the two cases. Partners are at law joint-tenants of their merchandize; one may dispose of the whole property; but part-owners are tenants in common of a ship; one cannot sell the share of another; and if this general lien exists, it must prevail against a purchaser even without notice; which does not seem consistent with the nature of the interest of a tenant in common. It is true indeed that, as long as the ship

(*f*) *Smith & others v. De Silva & others*, Cowp 469.

continues to be employed by the same persons, no one of them can be entitled to partake of the profits, until all, that is due in respect of the part he holds in the ship, has been discharged. But as one part-owner cannot compel another to sell the ship (*g*), there does not appear to be any mode, by which he can enforce against the others' share of the ship in specie the [95] payment of his part of the expences.

9. *b.* In the report of a case before *Lord Chancellor Hardwicke* (*h*) it is stated, that several persons having entered into a contract with one *T. Hall* empowering him to build and fit out a ship at their joint expence, for the service of the *East India* Company, and he having died insolvent without paying his portion of the expence, the others, who of course, remained answerable to the tradesmen for the whole, filed a bill against his administrator, praying that they might have a specific lien upon what should be due to him for his share [96] to this extent; and that the administrator might

(*g*) *Ouston v. Hebden*, 1 Wilson 101.

(*h*) *Doddington v. Hallett*, 1 Ves. 497, upon reference to the register book of the Court, A. 1749 *folio* 625. it appears that the plaintiffs had covenanted with *T. Hall* the intestate, to take certain shares subscribed for by them, and which amounted together to *eleven sixteenths* of a ship to be built and fitted out under his directions for the service of the *East India* Company, that the ship was accordingly built and equipped, and was then at sea, and the builder had executed a general bill of sale of the whole to him, and he had not executed any bill of sale to them for their respective shares. The defendant by his answer admitted, that he was a trustee for the plaintiffs as to the *eleven sixteenths*, but submitted that they were not liable to the tradesmen, because the debts were contracted by the intestate, and further insisted that they had no specific lien on the shares which, not being subscribed for, belonged to him. The *Lord Chancellor* decreed a reference to the master to take the accounts, and directed allowance to be made to the plaintiffs for all such sums as they had paid or were liable to pay to the tradesmen or workmen for building, equipping or victualling the ship, or for seamen's wages and declared that if any balance should appear due to them *they had a specific lien on the remaining shares for such balance*, and those shares were to be sold before the master, and the money applied in the first place to the discharge of such balance.

not apply this as part of his general assets for the benefit of all the creditors; and that his Lordship determined that they had a specific lien on his share for what they had paid or were liable to pay to the tradesmen for building and equipping the ship. The building and equipment had been managed by the deceased. In the course of his judgment, the *Lord Chancellor*, adverting to one part of the argument urged on the part of the administrator, is reported to have said, "the defendant's "counsel have been forced to resort to the case of an "assignment of a share for a valuable consideration: "which not being the case, I will not now determine, "because that is to be governed by the course of trade. "If it stood on the head of general equity, I should be "of opinion, that if such a purchaser had notice of the "partnership, he would be subject to it, and should not "doubt granting an injunction to that action of trover: "if he had not notice it is another thing, and a strong case "for that purchaser; because he would have gained the "legal interest: but if by the course of trade it is other-"wise, that will prevail and govern in this case, and "the Court will never extend a partnership of this kind "to affect purchasers beyond what the course of trade "will do, which is to govern in mercantile matters."

This usage, or course of trade, I apprehend to be to charge the assignee or purchaser in account for the outfit and other expences incurred, in respect of the voyage of which he is entitled, in consequence of [97] his purchase, to share the profits, which can be only the voyage in prosecution at the time of the purchase, but not to carry back the charge as against him to the expence of any antecedent adventure, from which he can derive no profit.

10. It is said to have been decided in the Court of Chancery, in a case where the majority of the part-owners had settled an account of the profits of a voyage, that the others were concluded thereby; and the Court would not entertain a suit by one of them to unravel the accounts (*i*). I presume this to have been a settlement with the master.

11. SECONDLY. As to the interest of part-owners with regard to strangers.

The several part-owners of a ship make in law but one owner; and in case of any injury done to their ship by the wrong or negligence of a stranger, they ought regularly to join in one action at law for the recovery of damages, which are afterwards to be divided among themselves according to their respective interests; for otherwise the party, who had committed the wrong, might be unnecessarily harassed with the expence [98] of several suits to obtain the same end, which might be as well effected in one. But this rule of law is made for the ease of the wrong-doer; and, therefore, the law requires that he should avail himself of it at the very beginning of the cause, by pleading in abatement of a suit brought by one part-owner, that there are others living, who ought to be parties to it. For if the defendant does not do this, the single part-owner will recover damages for the injury proportionate to his share in the ship, whether the nature of his interest is made to appear upon evidence at the trial, or is originally stated by himself in the allegation of his

(*i*) *Robinson v. Thompson*, 1Vern. 465. The *Hanseatic* Ordinance of 1614 requires the master at his return home to summon all the part-owners, to receive and pass his accounts, and imposes a fine upon those, who do not attend the *first* time in person or by agent; and at the *second* time authorizes the others to make a final settlement without them.

cause of complaint (*k*). And if afterwards another part-owner sues for his own interest, the defendant can no longer avail himself of the objection, because the party to the first suit has no longer any matter of complaint (*l*). In the case of the death of any part-owner after an injury received, the right of action survives in general to the surviving part-owners, who must afterwards pay to the personal representatives of the deceased the value of his share.

12. In the case, however, of an action for the freight of goods conveyed in a *general* ship, all the part-owners ought to join, or if they do not, the de- [99] fendant may avail himself of the objection by evidence at the trial, and without plea in abatement; according to the general rule of law, and the distinction between contracts and wrongs (*m*); unless perhaps some one should have received his own share, or have released his claim to it. The necessity of all the part-owners joining as plaintiffs in the suit in this case, is founded upon the consideration, that all of them are partners with respect to the concerns of the ship; and, upon this consideration, the present *Lord Chancellor*, in a case of bankruptcy, wherein it appeared that the owners of a ship, upon a settlement of accounts with the master, who had become a bankrupt, were indebted to him, and that, on the other hand, he also was indebted to some of them severally upon separate and distinct concerns,

(*k*) *Sands v. Child & others*, Salk. 32. *Addison v. Overend*, 6 Ter. Rep. in K. B. 766, and see *Dockwray v. Dickenson*, Comb. 366.

(*l*) *Sedgworth v. Overend*, 7 Ter. Rep. in K. B. 279. In this case, the plaintiff was the only remaining part-owner: but the opinion delivered by *Mr. Justice Lawrence* is an authority for the text.

(*m*) There is a loose note, in 3 Keeble, 444. *Stanley v. Ayles*, of a dictum of *Chief Justice Hale* at Nisi Prius, to the contrary of what is here advanced in the text; but the reporter adds, that the cause went off to a reference.

refused to allow the latter to set off their respective demands against the claim of his assignees for their shares of the general debt (*n*).

13. On the other hand, if an action is to be brought against the part-owners upon any contract relating to the ship, although regularly such action should be brought against all jointly, yet if all are not sued, the defendants can only avail themselves of the [100] objection by plea in abatement: and if they omit to plead such a plea, the plaintiff will recover his whole demand, and the defendants must afterwards call upon the others for contribution. And if a tradesman, who has repaired a ship, take from some of the part-owners sums equivalent to their shares, they still remain responsible for the residue, if not paid by the others, unless at the time of the payment the tradesman specially agree to discharge them from all further demand, upon some good consideration inducing him so to do, such as payment before the expiration of the usual credit; or release them by deed (*o*); which no prudent man will do without some very strong inducement (1). In this respect, the law of *England* differs

(*n*) *Ex-parte Christie*, 10 Ves. jun. 105.

(*o*) *Teed & another v. Baring & others*, before *Lord Ellenborough* Ch. J. at Guildhall, 1806. The receipt given by one of the plaintiffs was as follows: "Received 30th "*May* 1804, from *Messrs. B. M.* "*& Co.* one-fourth owner of the "ship WILLIAM, *Captain James* "*Thompson*, the sum of 450*l.*, be- "ing the amount of their propor- "tion of the said ship's repairs "lately done at *Plymouth*, we hav- "ing settled with the other own- "ers respectively. *John Teed &* "*Co.*" *Messrs. Baring & Co.* knew that the proportions had been adjusted, but not paid. See *Fitch v. Sutton*, 5 East. 230.

(1) But if, in such case, the tradesman takes in payment the bill of the ship's husband (a part-owner), and settles with him alone, the other owners are discharged. Therefore, where a

from the Civil Law, which gives an action against any one part-owner upon a contract made by the master to the full extent of the demand, but in the case of contracts made by the part-owners themselves, holds each to be chargeable only in proportion to his own share of the ship (*p*). By the law of *Holland*, the several part-owners are in all cases chargeable only according to their respective interests in the ship (*q*). (2)

(*p*) *Dig.* 14. 1. 1. 25. and 14. 1. 2. 3. & 4. (*q*) Vinnius in Peckium, p. 155.

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tradesman brought his action for cordage, against the owners of a ship, and it was proved that he had taken a bill for the amount of the managing owner, which was dishonored, and renewed, and again dishonored. Lord Ellenborough held that if the plaintiff had, by so dealing, adopted the managing owner, he discharged the others, and that it was not necessary that there should have been a receipt. If he adjusted the accounts with the managing owner on that footing, the others were entitled to the benefit of it; and the jury found for the defendants. Reed v. White, &c. 5 Esp. N. P. C. 122.

(2) In cases of abandonment, the insurers become the owners of the ship, and as such, are liable to the expences of repairs, and other necessary equipments for the ship, made after the time of the loss to which the abandonment refers. But in this case, as the ownership is thrown upon them by the law, and as the association is not voluntary, they have been held not to be partners; but that each is severally liable for his proportion of the expences in the ratio, the sum by him insured, bears to the whole sum insured on the ship. And the case was likened to the case of Hoare v. Dawes. Dougl. 371. where a broker was employed by a number of persons to purchase a lot of tea, of which they were to have a separate share, and he made the purchase,

and it was held that they were answerable severally, and not jointly. So it was decided in Coope, &c. v. Eyre, &c. 1. H. Bl. 37, on a purchase of oil. And *Kent C. J.* said the true principle was established in Speering v. De Grave. 2 Vern. 648, where it was decreed that for the necessary appropriations by the master for the wants of the ship, the owners should pay in proportion to their respective shares and interests in the ship. United Insurance Company v. Scott. 1 John. Rep. 106.

Part-owners of privateers are, in like manner, as part-owners of merchant ships, liable for any torts committed by the master or crew of such privateers. And in the court of admiralty, even where there has been a release to a part-owner from his responsibility, upon his paying a certain sum for damages, occasioned by the capture of a ship, and not proceeding to adjudication, the court will compel him to appear to a suit in common with the others, for in such a case the party injured has not only a right to call on all the owners for reparation, but also for all information in their possession. Karasan. 5 Rob. Adm. Rep. 260. And in Del Col v. Arnold. 3 Dall. Rep. 333, the Supreme Court of the U. S. held that, the owners of privateers are responsible for the conduct of their agents, officers and crew, to all the world, and that the measure of such responsibility, is the full value of the property injured or destroyed. See also Talbot, &c. v. Owners and Commanders of three Brigs. 1 Dall. Rep. 95. But in cases of capture by a privateer of neutral property, where restitution is decreed, *without damages*, the owners are not liable under the decree, unless the property or its proceeds come to their hands. Jennings v. Carson's executors. 4 Cranch. Rep. 2. Penhallow v. Doane's administrators. 3 Dall. Rep. 54.

PART THE SECOND.

OF THE PERSONS EMPLOYED IN THE NAVIGATION OF MERCHANT SHIPS.

CHAPTER THE FIRST.

OF THE QUALIFICATIONS OF THE MASTER AND MARINERS.

1. THE master of a ship is the person entrusted with the care and management of it. His power and authority are so great, and the trust reposed in him is of so important a nature, that the greatest care and circumspection ought to be used by the owners in the choice and appointment of him. It appears by the language of the ancient sea-laws and ordinances, that the master was formerly in almost every instance a part owner of the ship, and consequently interested in a twofold character in the faithful discharge of his duty. At present, it frequently happens that he has no property in the ship. The law of some countries requires a previous examination of the person to be appointed to this important office, in order to ascertain his nautical experience and skill: in other countries, he is liable to be punished as a criminal, if, having undertaken the charge, he is found incompetent to the performance of it (*a*). [102] In this country the owners are, except in one

(*a*) See *Cleriac* on the first article of the laws of *Oleron*; *French* Ordinance, liv. 2. tit. 1. *Du Capitaine* and *Valin* thereon. *Hanseatic* Ordinance of 1614. Tit. 3. Art. 1.

case, left to their own discretion as to the skill and honesty of the master; and although he is bound to make good any damage that may happen to the ship or cargo, by his negligence or unskilfulness, if he is of ability to do so, yet he cannot be punished as a criminal for mere incompetence.

2. The excepted case, to which I have just alluded, arises out of one of the humane provisions made by the *British* Legislature for the regulation of the *African* slave trade, by which it is made unlawful "For any "person to become a master, or to take or have the "command or charge of any *British* ship or vessel "(which shall clear out from any port of this kingdom "to take on board or to convey slaves from the coast "of *Africa*, to any part beyond sea) at the time he "shall clear out from any port of *Great Britain*, for "purchasing and conveying slaves from the coast of "*Africa*, unless such master, or person taking or hav- "ing the charge or command of any such ship or vessel "shall have made oath, and delivered in to the collec- "tor or other chief officer of the customs, at the port "where such ship or vessel shall clear out, a certificate "attested by the respective owner or owners of the ships "or vessels, *in which he has formerly served*, that he "has already served in such capacity, during one "voyage, or shall have served as chief mate or "surgeon, during the whole of two voyages, or [103] "either as chief or other mate, during three "voyages, in purchasing and carrying slaves from the "coast of *Africa*, under pain that such master, or other "person taking or having the charge or command of "any such ship or vessel, and also the owner or owners, "who shall hire or employ such person, shall for every

"such offence forfeit and pay the sum of five hundred "pounds (*b*)."

3. The other persons employed in the ordinary navigation of a trading ship, fall under the general denomination of mariners or seamen.

[104] 4. For the employment of a *British* ship it is necessary that the master, and a certain proportion of the mariners, should in many cases be *British* subjects, from a very obvious principle of public policy, enforced by various provisions of the Legislature. So long ago as the reign of Queen *Elizabeth*, it was made unlawful to lade or carry any fish, victual, or other things in any bottom, whereof a stranger born was shipmaster, from one port of the realm to another (*c*). An ordinance made in the time of the usurpation required, in some particular cases, the master and mariners, or

(*b*) 39 *Geo.* 3. *c.* 80. *s* 23. The duration of this act is not limited. A provision to the same effect had been previously made in several temporary statutes, in some of which, however, the words printed in *Italics* were omitted, but the Court of King's Bench put a construction on them, conformable to those words. *Farmer v. Legg*, 7 Ter. Rep. in K. B 186. But to obviate the inconvenience that had arisen from the omission, a retrospective clause is introduced into the 37 *Geo.* 3. *c.* 104. *s.* 25 38 *Geo.* 3. *c.* 88. *s.* 25. 39 *Geo.* 3. *c.* 80. *s* 38. that no Policy of Insurance made before the passing of those acts respectively shall be void, nor the *owners* liable to any penalty "by "reason of any certificate required "and given by the owner or own-"ers of the ship or vessel then a-"bout to clear out and sail, or by "the owner or owners of some "other ship or vessel, in whose "employ the person then about to "sail had been formerly employed "and sailed." To which however, "the *Statute* 38 *Geo.* 3. adds," so "as always the matter contained "in the said affidavits so made or "to be made as aforesaid, shall be "true in substance and matter of "fact." And the 39 *Geo.* 3. adds, "Provided always, that the matter "contained in such affidavits of the "*owner* or *owners*, heretofore made "as aforesaid, shall have been, and "in such affidavits as shall here-"after be made, shall be true in "substance and matter of fact." There seems to be a defect in each of these sections, as they leave the *master* liable to the penalty, which cannot have been intended. And there is a further inaccuracy in the last, as it mentions the affidavit of the *owners*, whereas the oath is to be taken by the *master*, and not by the *owners*.

(*c*) 5 *Eliz. c.* 5. *s.* 8. under forfeiture of the *goods*. To whichthe ordinance of the 9th of *October* 1651, and the Navigation Act, add also the forfeiture of the *vessel*.

the most part of them, to be of the people of the commonwealth (*d*).

The celebrated navigation Act, which passed immediately after the restoration, requires the master, and three-fourths of the mariners, to be subjects of the King, wherever it requires a *trading* ship to be either *English* built or *English* owned (*e*). And by a statute passed in the following year, "the number of mariners is to be "accounted according to what they shall have been "during the whole voyage (*f*)." These regulations, however, having been found inconvenient in time of war, several temporary (*g*) statutes have allowed, during such periods, the employment of three-fourths foreign seamen; and the two first of those statutes con- [105] ferred the privileges of *British* subjects upon foreign seamen after two years service in the time of war, either on board a ship of war, or a merchant or trading vessel.

5. By a statute passed in the *thirty-fourth* year of the present reign, it is enacted, that after the expiration of six months from the time that the conclusion of the war then existing, shall have been notified by proclamation or order of his Majesty in Council published in the *London* Gazette, (which was done on *Tuesday* the 27th of *April*, 1802,) no goods shall be imported into, or exported, or shipped for exportation, from any port or place in the kingdom of *Great Britain*, or the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, on board any vessel registered, or required to be registered, as a *British* vessel, unless such vessel be navigated by a

(*d*) *Ordinance* of 9th *October* 1651. *Scobell's* Acts.

(*e*) 12 *Car.* 2. *c.* 18. See *Reeve's* Law of Shipping and Navigation, p. 304, 305.

(*f*) 13 & 14 *Car.* 2. *c.* 11. *s.* 6. 28 *Geo.* 2. *c.* 16. 19 *Geo.* 3. *c.* 14. 33 *Geo.* 3. *c.* 26. 43 *Geo.* 3. *c.* 64.

(*g*) 8 *Anne*, *c.* 39. 13 *Geo.* 2. *c.* 3.

master and three-fourths of the mariners at the least *British* subjects (*h*). And that no vessel registered, or required to be registered as a *British* vessel, in any of the ports of *Great Britain*, *Guernsey*, *Jersey*, or the *Isle of Man*, or of any of the colonies, plantations, islands, or territories belonging, or which may hereafter belong, to his Majesty, his heirs or successors, shall be navigated but by a master and *three-fourths* of the mariners at least *British* subjects, except as thereinafter is provided (*i*). And that from the same period, no [106] goods shall be carried from any one port, member, creek, or place of *Great Britain*, or of the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, to any other port, member, creek, or place of the same or of any of them, in any such vessel, nor shall any such vessel be permitted to sail in ballast from one of the said ports or creeks to another, nor shall any such vessel be permitted to sail from the ports or coasts of this kingdom or of the said islands, to be employed in fishing on the said coasts, unless such vessel be *wholly and solely* manned with and navigated by a master and mariners all *British* subjects; with a proviso however, authorizing four or more of the commissioners of the customs in *England*, and three or more in *Scotland*, to licence the employment of foreign mariners not exceeding *one-fourth* in such vessel, in fishing on the coast of *Great Britain*, or of the said islands, for the purpose of instructing the *British* mariners in such vessel, in the art, of fishing, or taking or curing fish (*k*). And whereever it is required by the same or any other Act, that the master and the whole, or any proportion of the mariners, shall be *British* subjects, they must be so

(*h*) 34 *Geo.* 3. *c.* 68. *s.* 1 & 2.
(*i*) 34 *Geo.* 3. *c.* 68. *s.* 3.
(*k*) 34 *Geo.* 3. *c.* 68. *s.* 4.

during the *whole* voyage, unless in case of sickness, death, desertion, or of the whole or part of the crew being taken prisoners in the voyage, and, in such case, the master or person having the charge or command of the vessel, shall specify the same in his report (*l*). [107]

It is provided, however, that this Act shall not alter or affect any regulations for manning or navigating of ships employed in the *fisheries*, for which any special provision has been made by any statute in force (*m*).

6. And, in order to prevent doubts respecting the various terms made use of in the several laws of navigation, as to the persons who are to be deemed qualified to be masters of *British* ships, or to be *British* sailors, seamen, or mariners, it is by the same statute *declared and enacted*, that no person shall be deemed or taken to be qualified to be the master of a *British* ship, or to be a *British* sailor, seaman, or mariner, "except "the natural-born subjects of his Majesty, his heirs and "successors, or persons naturalized by or by virtue of "any Act of Parliament, or made denizens by letters "of denization, or except persons, who have become "his Majesty's subjects by virtue of conquest or ces-"sion of some newly-acquired country, and who shall "have taken the oath of allegiance to his Majesty, or "the oath of fidelity required by the treaty or capitu-"lation, by which such newly-acquired country came "into his Majesty's possession, except as therein pro-"vided (*n*)."

7. The same statute (*o*) confers a qualification to be thus employed upon *foreign* seamen, after *three* [108] years service in time of war on board any of

(*l*) 34 *Geo.* 3. *c.* 68. *s.* 5.
(*m*) 34 *Geo.* 3. *c.* 68. *s.* 5.
(*n*) 34 *Geo.* 3. *c.* 68. *s.* 6.
(*o*) 34 *Geo.* *c.* 68. *s.* 7.

his Majesty's ships, who shall obtain certificates of their faithful service and good behaviour from the commanders, or in case of their death, from the next in rank, and take the oath of allegiance. But (*p*) it also excludes from this capacity every person, however otherwise qualified, who, after he became qualified, has taken, or shall take, the oath of allegiance to any foreign sovereign or state, for any purpose, except under the terms of some capitulation upon a conquest by an enemy, and for the purpose of such capitulation only. But no ship or vessel shall be forfeited by reason of the employment of persons so disqualified, if the owners can shew that such disqualification of the master was unknown to them or their agents, and that such disqualification of a mariner was unknown both to them or their agents, and to the master. The statute, however, allows the employment as sailors, in the seas of *America* and the *West Indies*, of *negroes* belonging to persons qualified in the manner before-mentioned, if the conditions required by the statute 34 *Geo.* 3. *c.* 42. have been complied with, and in the seas to the eastward of the *Cape of Good Hope*, of *Lascars* and other natives of the countries to the eastward of that Cape.

8. And if any goods shall be imported or brought, exported, or carried coastwise, contrary to any of the provisions of this Act, the goods, vessel, [109] guns, and furniture, shall be forfeited: and if any vessel shall sail in ballast, or sail to be employed in fishing on the coast in the manner before-mentioned, or being required to be manned and navigated with a master and a certain proportion of *British* mariners in the manner before directed, shall not be manned and

(*p*) 34 *Geo.* 3. *c* 68. *s.* 8.

navigated according to the provisions of this Act, the vessel, with her guns and furniture, and all the goods on board, shall be forfeited (*q*). And all goods and vessels forfeited by this act may be seized by the commander of any of his Majesty's ships of war, or any commissioned, warrant, or petty officer, specially appointed by him, or any officer of the customs: the forfeiture to be recovered and applied in the same manner as any forfeiture incurred by any law respecting the revenue of the customs (*r*). And "in case any *British* "ship or vessel shall be found at sea, having on board "a greater number of *foreign* mariners than is allowed "by this Act, or any law now in force, or hereafter to "be made, and the master of such ship or vessel shall "produce a certificate of the actual necessity of engag-
"ing such foreign mariners in some foreign port,
[110] "by occasion of the sickness, death, or desertion
"of the like number of *British* mariners, or of "the same having been taken prisoners during his voy-"age, and that *British* mariners could not be engaged "in such foreign port to supply their room, and that "for the safe navigation of such ship or vessel it became "necessary to engage and employ such foreign mariners,

(*q*) 34 *Geo.* 3. *c.* 68. *s.* 10.

(*r*) 34 *Geo.* 3. *c.* 68. *s.* 11. It has been decided on the construction of the Navigation Act, 12 *Car.* 2. *c.* 18. *s.* 1. that by the seizure of a forfeited ship the property of the owner is divested, and he cannot maintain an action of trespass against the party making the seizure, although the latter do not proceed to the condemnation of the ship. *Wilkins v. Despard*, 5 Ter. Rep. in K. B. 112.*

* But until seizure, no property vests in the party entitled to the forfeiture; and therefore a *bona fide* alienation of a ship liable to forfeiture, before such seizure, vests a title, which is good against all the world. Per Winchester J. in the U. S. v. The Anthony Mangin. District Court of Maryland. 3 Cranch. Rep. 356. note. S. C. 2 Peters. Rep. 452.

"under the hand of his Majesty's consul at the foreign "port, where the said foreign mariners were so engag- "ed, or, if there is not any such consul there, under "the hands of two known *British* merchants at such "foreign port, it shall not be lawful for any of the per- "sons authorized by this Act to make seizures of ships "or vessels navigated contrary to the directions of this "Act, to stop or detain any such ship or vessel so "found at sea, or to hinder her from proceeding on her "voyage, but such persons shall and are hereby requir- "ed to indorse the certificate so produced, testifying "the production thereof, and when and where met with "at sea, and that the number of foreign mariners cor- "respond with the certificate of such *British* consul, or "such known *British* merchants, for the consideration "and investigation of the commissioners of his Majes- "ty's customs in *England* and *Scotland* respectively (*s*)."

9. There is in this statute a proviso reserving to his Majesty the power of issuing such proclamation as he was authorized to make by a statute [111] passed in the last reign (*t*), which enables the King at all times, when it shall be found necessary to declare war against any foreign power, to publish a proclamation to permit all merchant ships and other trading vessels and privateers to be manned with foreign mariners and seamen during such war, "so as the num- "ber of such foreign seamen or mariners do not exceed "*three-fourths* of the mariners at any one time employ- "ed to navigate such merchant ship, or other trading "ship or vessel, or privateer, and that *one-fourth* at "least of the mariners or seamen so employed be at all "times natives, or his Majesty's naturalized subjects of

(*s*) 34 *Geo.* 3. *c.* 68. *s.* 12. (*t*) 13 *Geo.* 2. *c.* 3. *s.* 1 & 4

"*Great-Britain*, sudden death, and the hazard and casualties of war and the seas, saved and excepted."

10. Since the Union of *Great-Britain* and *Ireland*, regulations similar to those which I have just detailed, have been made by the Legislature with respect to the navigation of *Irish* ships by subjects of the United Kingdom (*u*). (1)

(*u*) 42 *Geo.* 3. *c.* 61. *sect.* 1 *to* 15.

CHAPTER THE SECOND.

OF THE AUTHORITY OF THE MASTER WITH REGARD TO THE EMPLOYMENT OF THE SHIP.

1. A TRADING ship is employed by virtue of two distinct species of contract; *First*, The contract by which an entire ship, or at least the principal part thereof, is let for a determined voyage to one or more places: this is usually done by a written instrument, signed and sealed, and called a *Charter-party*. *Secondly*, The contract by which the master or owners of a ship destined on a particular voyage, engage separately with a number of persons unconnected with each other, to convey

(1) There is no statute of the U. S. prohibiting the employment of foreign seamen, or requiring any portion of the crew to be Americans. By the registry act, the master must be a citizen of the U. S., in order to preserve the rights vested by that act.

their respective goods to the place of the ship's destination. A ship employed in this manner is usually called a *general* ship.

The nature of each of these contracts will form the subject of particular discussion hereafter (*a*). In the present chapter it is proposed to consider only the power of the master to bind the owner of the ship by these engagements.

2. The owners rarely navigate a trading ship [113] by themselves; the conduct and management of it are almost always entrusted to the master, whether he has, or has not, a partial property in it. In the latter case he is the confidential servant or agent of the owners at large; in the former, of his copartners. In either case by the law of England, and in conformity to the rules and maxims of that law in analogous cases, the owners are bound to the performance of every lawful contract made by him relative to the usual employment of the ship. They are bound to this performance by reason of their employment of the ship, and of the profit derived by them from that employment (*b*). One part-owner, who dissents from a particular voyage in the manner mentioned in a preceding chapter (*c*), is not bound, because he does not employ the ship on that voyage, nor derive any profit from it (*d*). The course the usual employment of the ship is evidence of authority given by the owners to the master, to make for them and on their behalf a contract relating to such employment; and consequently a contract so made by him is esteemed in law to have been made by them. It (*e*) is

(*a*) Part 3. chap. 1 and 2.
(*b*) See *Molloy*, book 2. chap. 2. sect. 14.
(*c*) Part 1. ch. 3. sect. 4.
(*d*) By *Holt*, Ch. Just. in *Boson v. Sandford* Carth. 63.
(*e*) *Morse v. Slue* or *Sluce*, 1 Vent. 190. 238.

true that the master also is answerable for his own contract; for in favour of commerce the law will [114] not *compel* the merchant to seek after the owners and sue them, although it gives him the power to do so; but leaves him a two-fold remedy against the one or the other. But in pursuing this remedy, care must be taken to describe the defendant according to his real character. For in an action at law (*f*), brought against a person as master, at the trial whereof it appeared upon the proof that the defendant was not master but owner, the plaintiff failed in his suit.

3. This rule of the law of *England* agrees with the law of other commercial nations. When the Romans began to engage in commerce (*g*), a new species of action under a particular name appears to [115] have been introduced, to ascertain and enforce this responsibility of the owners for the acts of their servants; and by the *Prætorian Edict* the owners or

(*f*) *Richwood v. Footmer*, coram *Kenyon*, Ch. J. Sit. p. Hil. T. 1790.

(*g*) Dig. 4. 9. *Nautæ, caupones, stabularii. ut recepta restituant.*

Dig. 14. 1. *De Exercitoria actione.* *Molloy* in his treatise *De Jur. Marit. et naval.* book 2. chap. 2. sect. 2. appears to have mistaken the character of the *Exercitor navis* of the civil law, and to have supposed him to be the *master* of the ship; whereas in truth he is the *employer* of the ship, and consequently must be the absolute, or at least the temporary owner. "*Magistrum* navis accipere debemus, cui totius navis cura "mandata est. Magistrum autem "accipimus non solum, quem exercitor præposuit, sed et eum, quem "magister. *Exercitorem* autem "eum dicimus, ad quem obvenitiones et reditus omnes pervenient, sive is Dominus sit, sive a "domino navem per aversionem "conduxit, vel ad tempus, vel in "perpetuum." Dig. 14. 1. And *Roccus*, Not. 3. speaks to the same effect of the *Magister*. This author usually calls the owner *dominus navis*, but he often speaks of him as the person *qui exercit navem*. Again, in the *Dig.* 4. 9. 1. 2. we find the following commentary on the *Prætorian Edict*. The terms of the edict are "Nautæ, caupones, "stabularii, quod cujusque salvum "fore receperint, nisi restituant, "in eos judicium dabo." Upon which *Ulpian* writes thus, "Ait "Prætor *Nautæ; Nautam* accipere "debemus eum, qui navem exercet, quamvis nautæ appellantur "omnes, qui navis navigandæ causa in nave sint, sed de *exercitore* "solummodo Prætor sentit, nec "enim debet per remigem, aut "mesonautam obligari, sed per se, "vel per navis *magistrum*."

(to render the Latin word more nearly) the employers, of the ship are made responsible for the faults of the mariners and master, and for the contracts also of the master; but not for the contracts of the mariners, because the mariners are not appointed for the purpose of conducting the business of the ship, but only of labouring in its navigation under the orders of the master. And with regard to the contracts of the master, a distinction is taken by the commentators on the Edict between such as the owners have authorized him to make, and such as they have not authorized him to make; but in general it appears that they were answerable for all acts, of which his character and situation afforded the presumption of authority, even if he contravened the orders received from them; unless the party, with whom he contracted, were acquainted with the orders, by which his authority was restrained. Thus it is expressly laid down, that if the master appointed another person to supply his place, contrary to the positive orders of the owners, the owners were responsible for the conduct of the master so appointed even against their will. On the other hand, if a ship were built for the purpose of conveying passengers only, or merchandize only, and employed in that particular trade, the [116] owners were not answerable for a contract made by the master to employ the ship for a different purpose in a different trade. This agrees with the terms of the rule as above laid down, because such a contract does not relate to the usual employment of the ship.

4. The modern nations of *Europe* appear to have adopted nearly the same rules, founded on the same

principle (*h*), with certain limitations, that will be noticed hereafter. Indeed it often happens that no contract can be made with the owners personally; as when the ship is in a place distinct from their residence. Even when the ship is at the place of their residence, and is intended to be employed as a *general* ship, it rarely happens in practice that the owners interfere with the receipt of the cargo; and without doubt they are by our law bound by every contract made by the master relative to the usual employment of *such* a ship.

5. A charter-party, made by the master in his own name, furnishes no direct action against the owners, grounded upon the instrument itself, by the law of *England*: but when this contract is made by the master in a foreign port in the usual course of the ship's employment, and under circumstances, which do [117] not afford evidence of fraud, or when it is made by him at the ships home under circumstances, which afford evidence of the assent of the owners; the ship and freight, and therefore indirectly the owners also, to the amount of the value of the ship and freight, are by the marine law bound to the performance (*i*). "*The ship is bound to the merchandize, and the merchandize to the ship,*" are the words of *Cleirac* (*k*). By the *French* Ordinance (*l*) it is declared, that the ship, with

(*h*) *Roccus*, Not. 11 to 18 inclusive, and Not. 26, 27, 28. Not. 49, *ad finem*, and Not. 65. *Guidon*, ch. 18. art. 4. and *Cleirac's* Comment thereon. *French* Ordinance, liv. 2. tit. 8. *Des Proprietaires de navires*, art. 2. and the Commentary of *Valin* thereon. *Pothier*, Charter-partie, sect. 2. art. 3. *Welwood's* Sea Laws, tit. 15. See as to the limitations, part 3. ch. 5.

(*i*) An instance of a sentence in *Spain* against master and *ship* for barratry and deviation by the master, who had let the ship by a charter-party, is mentioned in an anonymous case in 2 Ch. Ca. 238.

(*k*) *Les Us & Coutumes de la mer*, p. 72

(*l*) *French* Ordinance, liv. 3. tit. 1; *Des Chartes-parties*, art. 11; and see liv. 1. tit. 14. *De la saisie des vaisseaux*, art. 16.

its furniture and freight, and the cargo, are respectively bound to the stipulations of the charter-party. And *Valin* in his commentary says, the rule is the same whether the affreightment be made by the owner, or the master alone, even at the place of the owner's abode, if the owner does not disavow it.

By the *French* Ordinance (*m*) the master is bound to follow the advice of the owners, when he freights the ship at the place of their abode. The Ordinance of the *Hanse-Towns*, art. 58. is to the same effect. *Valin* in his commentary on the *French* Ordinance, restrains the necessity of this consent of the owners to the presence of all or the greater part of the owners, or of one [118] appointed to act for all; and says, that if in such a case the master make a contract without their consent, the owners may annul it, and make another by their own authority. But the master himself will be answerable for the non-performance of it. This doctrine is also adopted by his countrymen *Pothier* (*n*).

It is true indeed that this principle of the maritime law, by which the ship itself in specie is considered as a security to the merchant, who lades goods on board of it, cannot be carried into effect in this country, because the Court of Admiralty, in which alone proceedings can be carried on against the ship, has no jurisdiction in such a case. But I apprehend the owners may be made responsible, either by a special action on the case at the Common Law, or by a suit in Equity, for the faithful performance of the stipulations of a charter-party made by the master under the circumstances before mentioned.

(*m*) Liv. 3. tit. 1. *Des Chartes-parties*, art. 2.

(*n*) *Pothier*, Charte-partie. num. 48.

6. The general rule before laid down, *viz.* That the owners are bound by every lawful contract made by the master relative to the usual employment of the ship, is proved, as to the case of a *general* ship, by the following judicial authorities.

In the case of *Boson v. Sandford* & *others* (*o*), which was an action brought against some of the [119] part-owners of a ship employed in the coasting trade between *Exeter* and *London*, to recover the value of goods lost, which had been delivered to the master at *Exeter* without the knowledge of the owners, to be conveyed from thence to *London;* the Court held that the owners were answerable for a loss under such circumstances, but decided the case against the plaintiff, because the action was brought against some only, and not against all the part-owners.

In the case of *Boucher v. Lawson* (*p*), which was an action brought against the owner to recover the value of *Portugal* coin delivered to the master at *Lisbon*, to be conveyed to *London*, and of which by the usage of that particular trade the master was to receive the freight to his own use, and which the master had embezzled; the Court held that, if it had appeared that the ship was employed in carrying goods for hire, the owner would have been answerable for this loss; for although the exportation of coin was prohibited by the laws of *Portugal*, yet the importation of it into this country was allowed by our laws, and so the trade was lawful here; and it was of no consequence, whether the master was

(*o*) *Boson v. Sandford & others*, Carth. 58. 3 Lev. 258. 3 Mod. 321. 1 Show. 29. 101.

Note. It would now be held, that as the defendants had not pleaded in *abatement*, they could not avail themselves of the ground upon which this case was decided against the plaintiff. See part 1 ch. 3. sect. 13.

(*p*) Rep. temp. *Hardwicke*, p. 85. 194.

rewarded for his services by wages paid by the owner, or by receiving part of the earnings of the ship: but as it did not appear that the ship was employed in carrying goods for hire, but for any thing that appear-
[120] ed in the case, the ship might have been sent to *Lisbon* for a special purpose, and if so (as the Chief Justice said) no man could say that the master, by taking in goods of his own head, could make the owners liable: it was decided that the plaintiff should not recover.

The facts of the case of *Ellis v. Turner & another* (*q*), which was an action brought against the owners for the value of goods damaged by the sinking of their vessel, were as follows. The vessel was employed in carrying goods from *Hull* to *Stockwith*, and to *Gainsborough*, which is a little farther than *Stockwith*, but the freight was the same for conveyance to either place. On former voyages the goods destined to *Stockwith* had sometimes been delivered there on the way to *Gainsborough*, and at other times carried forward to *Gainsborough*, and delivered at *Stockwith*, on the return to *Hull*. The goods in question were delivered to the master on his express undertaking to deliver them at *Stockwith* on his way to *Gainsborough*. This particular undertaking was made by the master without the privity of the defendants, but he had a general authority from them to receive and convey goods for the customary freight from *Hull* to *Stockwith* and *Gainsborough*. The defendants had previously given public notice, with which the plaintiff's agent, who shipped the goods, was acquainted, that they would not be answerable for any

(*q*) 8 Ter. Rep. in K. B. p. 531.

loss or damage that might happen to any cargo, unless occasioned by the want of ordinary care [121] and diligence in the master and crew, in which case they would pay *ten per cent.* upon the loss, provided such payment did not exceed the value of the vessel, but that they were willing to insure against all accidents upon receiving extra-freight in proportion to the value. No agreement had been made for the payment of extra-freight for the goods in question. The vessel took in other goods to be delivered at *Stockwith* in the present voyage, and arrived safely at that place. The master delivered some of the other goods there, and was requested by the wharfinger to deliver all, that were destined for that place, but without the knowledge of the defendants refused to deliver the others, alleging that they were stowed below the goods destined to *Gainsborough.* On the way from *Stockwith* to *Gainsborough* the vessel sunk, without any want of ordinary care in the master or crew, and the goods in question were damaged. The court held that the plaintiff should recover the amount of his loss. And *Lord Kenyon* said, "As the vessel reached *Stockwith* in safety, and might "have delivered the goods there, I think this action "may be maintained. For though the loss happened in "consequence of the misconduct of the defendants' ser-"vant, the superiors (the defendants) are answerable for "it in this action. The defendants are responsible for "the acts of their servant in those things, that respect "his duty under them, though they are not [122] "answerable for his conduct in those things "that do not respect his duty to them; as if he "were to commit an assault upon a third person in the "course of his voyage."

7. It may be observed, that in each of the above cases the contract, upon which the action was brought, was made by the master without the particular knowledge of the owners. In the first, it was made in the course of the usual employment of the vessel, and therefore the Court held the owners to be bound to the performance as a general rule, although they thought the particular suit improperly brought. In the second, the contract was not made, or at least did not appear to have been made, in the course of the usual employment of the ship, and therefore the owner was not bound by it. In the last, the contract was made in the course of the usual employment of the ship, and therefore it was considered to be a contract made in substance by the owners.

8. From the decision of the last of the above cases, it seems also to follow, that if the master make a particular engagement or warranty, relating to the conveyance of merchandize according to the usual employment of the ship, the owners will be bound by such engagement or warranty, although made without their knowledge. And the law was so laid down by *Lord Kenyon*, in his direction to a jury upon the trial of an action (r) brought by a merchant against the owners of a ship on a warranty, that the ship should sail with con- [123] voy from the place of rendezvous, which had not been complied with. A broker in *London* had been employed by the master to advertise the ship as a general ship, bound to *Hamburgh;* and in the printed papers the broker had inserted a clause purporting that the ship was to sail with convoy from the place of rendezvous. There was no evidence given either of the assent, or dissent, of the defendants (the owners) to this war-

(r) *Ringuist v. Ditchell.* Guildhall Sit. p. Mich. Ter. 40. *Geo.* 3.

ranty, or of their knowledge of it. But there was contradictory evidence upon a question made at the trial, whether the master had forbidden the broker to insert this clause. His Lordship however told the Jury that he thought that point quite immaterial, for as the broker was authorized to advertise the ship, the owners were answerable to strangers for his acts, although he had exceeded his authority; and must seek their remedy against him. And the plaintiff succeeded in the cause.

9. From this rule of law, by which the owners are bound to the performance of these contracts, it follows as a corollary, that they must answer for a breach of them, although committed by the master or mariners against their will, and without their personal fault.

10. The great responsibility, which the laws of commercial nations cast upon the owners for the acts of the master in this and other cases, has appeared to many persons, at first view, to be a great hardship; [124] but laying aside all consideration of the opportunities of fraud and collusion, which would otherwise be afforded, it should always be remembered, that the master is elected and appointed by the owners; and by their appointment of him to a place of trust and confidence, they hold him forth to the public as a person worthy of trust and confidence; and if the merchants, whom he deceives, could not have redress against those who appointed him, they would often have just reason to complain, that they had sustained an irreparable injury through the negligence or mistake of the owners; as the master is seldom of ability to make good a loss of any considerable amount.

CHAPTER THE THIRD.

OF THE AUTHORITY OF THE MASTER WITH REGARD TO REPAIRS AND OTHER NECESSARIES FURNISHED TO THE SHIP.

1. THE obligation, to which the master of a ship may subject the owners, to pay the charge of repairing their ship, and the price of stores and provisions supplied for the use of it, or to repay money advanced for those purposes, is sometimes *direct*, furnishing an action against themselves personally; sometimes *indirect*, to be prosecuted by a suit against the ship. It is proposed in the present chapter to consider it distinctly under each of these forms.

2. It should be premised however that the master is always personally bound by a contract of this kind made by himself, unless he takes care by express terms to confine the credit to his owners only (*a*). But such a contract made by the owners themselves (*b*), or under circumstances, which shew that credit was given to them alone (*c*), gives the creditor no right of action against the master.

3. And FIRST, as to the *personal* obligation of the owners.

I have in the preceding chapter stated the nature and grounds of the owners' obligation in the case of

(*a*) *Rich v. Coe*, Cowp. 636.*
(*b*) *Farmer v. Davis*, 1 Ter.Rep. in K. B. 108.
(*c*) *Hoskins v. Slayton*, before *Lee, J.* at Guildhall, Cases temp. *Hardwicke*, 376.

* See also Hussey v. Christie, 9 East. 426.

contracts made by the master for the carriage of merchandize in their ship. Their obligation in the case of his contracts now under consideration, is of the same nature, and depends upon the same principles ; for, as those relate to the employment of the ship, so these relate to the means of employing it; and accordingly we find the obligation of the owners in both cases laid down in the very same parts of the civil law (*d*), and treated under one head. And as the master [126] in general appears to all the world as the agent of the owners in matters relating to the usual employment of the ship, so does he also in matters relating to the means of employing the ship : the business of fitting out, victualling, and manning the ship, being left wholly to his management in places where the owners do not reside, and have no established agent; and frequently also even in the place of their own residence. His character and situation furnish presumptive evidence of authority from the owners to act for them in these cases, liable indeed to be refuted by proof that they, or some other person for them, managed the concern in any particular instance, and that this fact was actually known to a particular creditor, or was of such general notoriety, that he cannot be supposed to be, because he ought not to have been, ignorant of it.

3. In order however to constitute a demand against the owners, it is necessary that the supplies furnished by the master's order should be reasonably fit and proper for the occasion, or that money advanced to him for the purchase of them should at the time appear to be wanting for that purpose. The contrary in either case

(*d*) *Dig. De Exercitoria actione*, 14. 1. 1. 8. & 9. and 14. 1. 7.

would furnish a strong presumption of fraud and collusion on the part of the creditor(1).

4. It is true indeed that *Lord Chancellor Hardwicke* once entertained a doubt as to the effect of contracts of this kind made by the master under the orders of a managing owner, and directed a trial at [127] law, to determine whether or not the other owners were chargeable (*e*). But in an earlier case (*f*) where the master of a ship, having bought provisions and stores upon credit, failed, and the tradesmen sued the part-owners in the Court of Chancery for the price; the Court (*g*), considering the master as a servant to the owners, decreed that they should pay in proportion to their shares, and said that "*if the owners paid their "servant, yet if he paid not the creditors, they must "stand liable.*" And in an action at law (*h*), the rule was said to be, that *primâ facie* the repair of a ship has his election to sue the master, who employs him, or the owners; but if he undertakes it on a special promise from either, the other is discharged.

5. In the cases before mentioned the facts appear to have happened in *England*. In a case (*i*) tried before

(*e*) *Buxton v. Snee*, 1 Vesey, 154. A. D. 1748.

(*f*) *Speering & others, v. Degrave & others*, 2 Vern. 643. A. D. 1709.

(*g*) *Lord Chancellor Cowper*, I presume.

(*h*) *Garnam v. Bennet*. 2 Stra. 816.

(*i*) *Evans v. Williams*. Sit. p. Trin. T. 28 *Geo*. 3. A new trial was moved for in the following Michaelmas Term, and upon argument refused.

In *France*, the master of a ship was formerly held to possess this power of charging the person of his owners for money borrowed for the necessities of the ship in the course of a voyage. See *Valin* on the *French Ordinance*, liv. 2. tit. 1. *Du Capitaine*, art. 19. tom. i. p. 443. But *Emerigon*, tom. ii. p. 458, &c. cites four decisions of the courts of his country, (two of which were reversals of Judgments pronounced in the Admiralty of *Rochelle*), by which the owners were declared

(1) See to the same purpose Wainwright v. Crawford 4 Dall. 225.

Lord Kenyon at Guildhall, where the master of the ship had borrowed money *abroad* for the use of the [128] ship, his Lordship held that the lender might recover against the owners the money laid out upon the ship; and this opinion was afterwards confirmed by the court of King's Bench. It was proved at the trial that the master could not obtain money on the security of the ship alone, which, in the event that happened, would have been more beneficial to the owners because the ship perished on the voyage home. In such an event the *Consolato del Mare* expressly declares the owners not to be personally responsible(*k*).

6. Another case (*l*), in which a claim was made upon the owner for money advanced to the master abroad in the course of a foreign voyage, underwent a great deal of discussion, and seems worthy of [129] particular notice. *Sir Humphrey Jervis*, who lived at *Dublin*, being sole owner of a ship lying at *Bristol* under the command of *S. Symons*, and originally intended to be freighted from thence to *Ireland*, being disappointed in that voyage, and informed by *Symons* that a freight could be got for the *West Indies*,

not to be personally responsible, the ship having perished on the voyage; but in each of those cases the master was held liable to pay the debt; and in the last of them it was determined that he had a right to be repaid out of the proceeds of goods belonging to the owners, which had been landed in a former part of the voyage, and they were ordered to account to him for the value of them. The learned author speaks of these decisions as an alteration of the law of his country, and cautions masters of ships against drawing bills upon their owners in such cases, The caution should also be extended to those, who may be in a situation to advance money on such occasions, and who should understand that they cannot by the law of *France* have the personal security of the owners of the ship. The new doctrine appears to be founded on a new construction of that article of the ordinance, which declares that the owners shall be responsible for the acts of the master, but shall be discharged on abandoning the ship and freight *Liv.2.tit.8. Des Proprietaries,art.2.*

(*k*) Cap. 240.

(*l*) *Cary v. White*, 1 Bro. Par. Cases 284. A. D. 1710.

if he approved of it, wrote to *Symons* to accept such freight, and to take up as much money upon *bottomry*, as would fit out the ship, and provide a stock for port-charges. *Symons* thereupon entered into a charter-party with *Cary* a merchant at *Bristol* for the hire of the ship for a voyage to the *West Indies* and back to *Bristol;* and by the terms of the charter-party the owner was to pay the seamen's wages, and provide all necessaries for the ship; but *Symons*, not being in cash for this purpose, borrowed 200*l.* upon *bottomry*, of *Cary*, and also obtained a letter of credit from him to his correspondents in *Jamaica*, for whatever money he might further want either to repair the ship, or furnish her with provisions, or to pay the seamen's wages. The ship proceeded to *Jamaica*, and there *Symons* the master, by virtue of *Cary's* letter of credit, took up several sums amounting to 789*l.* On the return from *Jamaica* to *Bristol* the ship was lost. *Sir Humphrey Jervis* refused to pay *Cary* the 789*l.*, and *Cary* thereupon sued him for the the recovery of it in the Court of Chancery in *Ireland*, alleging that the money was expended in repairs and other necessary purposes; and, he dying during the suit, the proceedings were revived [130] and carried on against his administrators. The *Lord Chancellor* of *Ireland*, assisted by one of the Chief Justices and another Judge, at first decreed that *Cary* should recover so much of the money claimed, as upon a trial at law should be found to have been thus expended; but the cause was afterwards re-heard, and the Court declared that *Cary* was not entitled to any relief. Upon this *Cary* appealed to the *British* House of Lords, before whom the cause was heard. On behalf of *Cary* it was argued, "That at common law

"whatever is done by a servant, which is for the bene-
"fit of his master, and within the *trust* and duty of his
"place, binds the master, as if done by himself; and
"in a voyage, the master of a ship is the owner's ser-
"vant, whose duty requires him to provide necessaries
"for the ship, it being the owner's interest that they
"should be provided; so that whatever the master nec-
"essarily takes up and employs for that purpose, the
"owner is bound to pay. And that by the custom of
"merchants, if the master be supplied with necessaries
"for the ship by the order or credit of any freighter,
"the owner is liable to pay such freighter, and on that
"ground it is customary for freighters to furnish mas-
"ters of the ships they take to freight, with letters of
"credit for whatever money they may happen to want,
"for the necessary service of the ship."

On the other side it was contended, "That it would
"be of most dangerous consequence for the
"master of a ship to charge the person or es- [131]
"tate of his owner with what money he should
"take up on pretence of providing for the ship without
"an express power or authority for that purpose; for
"that the law of merchants had never carried it further
"than to invest the master with a power of mortgaging,
"or charging the ship, or cargo, with such money.
"That in the present case the money could not be laid
"out by the appellant or his factors upon the credit of
"*Sir Humphrey Jervis*, not only because he was a to-
"tal stranger to them, but principally because he had
"for two years before failed in his circumstances, and
"lost his credit; nor was it even pretended that *Sir*
"*Humphrey* ever gave any authority to the master to
"take up money otherwise than on *bottomry*. That if

"*Sir Humphrey's* person or estate was in all events "liable to make good this 789*l.* besides the 200*l.* "advanced on the *bottomry bond*, and which, in case the "ship had returned safe to *Bristol*, he would have been "answerable for, he must of necessity have been a very "great loser, as the ship cost at first but 700*l.* and her "freight in that event would not have brought above "600*l.*; and therefore, if *Sir Humphrey* himself had "been at *Jamaica*, he never would have consented to "take up money for preserving that, which would have "been so much to his loss. And that the appellant's "interest in the ship, by having 200*l.* on *bottomry*, at "a large interest to be paid on her return, was
[132] "much greater than *Sir Humphrey's*, and there-
"fore whatever money was laid out in *Jamaica*, "ought to be considered as laid out on the account of "the appellant, but yet to be discounted out of the ship "and freight, so far as it would extend, on its return." The House of Lords thought the owner personally responsible, if the allegations of *Cary*, as to the necessity of the expenditure, were true; and directed a trial by jury in the Court of Common Pleas in *Ireland*, to ascertain whether any, and what sums of money, were *necessarily* laid out by, or by the order of *Cary* for the payment of seamen's wages, provisions, or otherwise, for the *necessary repairs and use of the ship during the voyage*, and decreed those sums to be paid to *Cary*, and directed the *Lord Chancellor* of *Ireland* to order the necessary steps for the trial of the cause. The cause (*m*) was accordingly tried at the bar of the Court of Com-

(*m*) The subsequent proceedings are not mentioned by *Brown*. This account of them is taken from the printed cases delivered to the House of Lords, and the Journals of the House, 1st June, 1717. The account of the evidence given at the trials contains nothing of general interest.

mon Pleas in *Ireland*, and the jury declared by their verdict, that nothing had been *necessarily* expended for these purposes by, or by the order of *Cary*. *Cary* applied to the *Lord Chancellor*, who ordered a second trial, and the cause was again tried at the bar of the Court of Common Pleas in *Ireland*, before another jury, who gave the same verdict, and the *Lord Chancellor* thereupon dismissed *Cary's* suit with costs [133] from the time of the judgment of the House of Lords. Upon this *Carey* again appealed to the House of Lords; but no person appearing before the House to support his appeal at the day appointed, the House dismissed it with costs.

7. This case, while it establishes the principle of the personal responsibility of the owners, shews also that the creditor is required to prove the actual existence of the necessity of those things, which give rise to his demand. The authority of the master is to provide *necessaries;* if therefore a person trusts him for a thing not necessary, he trusts him for that, which it is not within the scope of his authority to provide; and consequently has no right to call upon his principal for payment (1).

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(1) The law with respect to the personal responsibility of the owners in similar cases, seems to be well established in the U. S., and the English doctrine fully recognized. See in New York, Milward v. Hallet, 2 Cain. Rep. 77. United Insurance Company v. Scott, &c. 1 John. Rep. 106. Read, &c. v. The Commercial Insurance Company. 3 John. Rep. 352. In Pennsylvania, Wainwright, &c. v. Crawford, 4 Dall. Rep. 225. Rucher, &c. v. Conyngham, 2 Peters. Rep. 295. Blaire v. Ship Charles in the Supreme Court of the U. S. 4 Cranch. 328. Capisino v. Perez, 2 Dall. Rep. 194. In this last case the court

8. From what has been said, it follows that if the master expend money of his own for these purposes, he has a right to call upon the owners to repay him (*n*). (2)

(*n*) *Roccus*, Not. 34, 35.

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were of opinion, that there was no necessity for the borrowing of the money, and they said, "it is clear that the captain can "hypothecate his vessel only in case of necessity, such a neces- "sity, as that if he did not take up the money, the voyage would be defeated, or at least retarded. This does not ap- "pear to have been the case in the present instance. But in "addition to the general rule, it is held that the captain cannot "hypothecate, while there are goods *of his own or of his owner* "*on board*. Now if there was no authority to hypothecate the "vessel, how can it be pretended that he can make the owners "personally responsible? Great mischiefs would ensue, if the "master had such a power."

And the owners are not liable for extraordinary repairs, &c. such as arming the ship, &c. if there be not a very urgent necessity, 1 John. Rep. 106. And if the master draws a bill of exchange on his owners, for the amount of the repairs and expences of the ship, which is not accepted, an action for money laid out and expended, will lay against them for the amount, 2 Cain. Rep. 77., and it seems that where the cargo is freighted, and money is borrowed by the master to pay for the exportation duty, that such sum may be recovered of the owner of the ship, under the head of necessaries, more especially if such cargo has been delivered to the owner of the ship. ibid. It has been stated in a preceding note, that after abandonment the underwriters are liable to pay for repairs and expences of the ship abandoned, and the cases cited in this note from Johnson's Reports, are authorities to the point.

(2) From the general liability of the master, on all contracts, made by him respecting the ship, and the necessity of his ob-

9. Secondly, as to charges upon the *ship in specie*. Every man, who had repaired, or fitted out a ship, or lent money to be employed in those services, [134] had by the law of *Rome* (*o*), and still possesses in those nations (*p*) which have adopted the

(*o*) Dig. 42. 5. 26. "Qui in navem extruendam vel instruendam credidit, vel etiam emendam privilegium habet." And id. 1. 34 "Quod quis navis fabricandæ, vel emendæ, vel armandæ vel instruendæ, causa, vel quoquo, modo, crediderit, vel ob navem venditam, petat, habet privilegium post fiscum." See also *Dig.* 20. 4. 5. and 6. *Novell*: 97. c. 3. *Domatt's* Civil Law, Book 3. Tit. 1 sect. 5 and *Vinnius in Peckium*, p. 99. and 233.

(*p*) See particular regulations on this subject in the *French Ordinance*, Liv. 1. Tit. 14. *De la saisie et vente des vaisseaux*

taining supplies for her use, arise his right to detain the freight until he has fully paid his expences and disbursements. He has a lien on the freight for this purpose. Lane v. Penniman & trustee, 4 Mass. Rep. 91. Milward v. Hallet, 2 Cain. Rep. 77. And therefore if the master has contracted debts on account of the ship, and he gives notice to the shipper, not to pay the freight to the owner, and the freight is paid, he may nevertheless recover to the amount of these debts from the shipper, where payment will be considered as in his own wrong. For the master by reason of his liability to pay for articles furnished to the ship, acquires a lien on the freight, and the goods, coextensive with the debts contracted. White v. Baring, 4 Esp. N. P. C. 22. And it seems that the master has not only this lien, but that he may as a general creditor, retain the freight against his owners or their assignee, where the assignment is not made before the freight has been earned, and due notice given to him that he is to pay it over to the assignee. Hodgson v. Butts, 3 Cranch. 140.

But the master has no lien on the ship for payment of debts incurred on account of the ship. This was decided in the case of Hussey v. Christie & others, 9 East. 426. which was sent

Civil Law as the basis of their jurisprudence, a privilege or right of payment in preference to other creditors, upon the value of the ship itself, without any instrument of hypothecation, or any express contract, or agreement,

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from the Court of Chancery. Lord Ellenborough, in delivering the opinion of the court said, "if the repairs be done here, the "owners are liable, though the master may also become liable "on his own contract, if he do not stipulate against his personal "responsibility, and confine the credit to his owners. If the "necessary repairs be done abroad, the master may hypothe-"cate the ship for them, and it is his own fault if he subject "himself to any personal responsibility, which he may renounce. "It is said however that because he may hypothecate, he may "acquire a lien by taking upon himself the payment of the re-"pairs, for that the persons to whom he hypothecates, acquire "an inchoate lien on the ship, inasmuch as they are entitled "by suit in the Admiralty Court, to acquire possession of the "ship itself. But it does not follow because others, through the "master and his hypothecation, may acquire a lien on the ship "that therefore, he, himself has such a lien. We have no au-"thority fitting here to originate a lien."

But in Gardner,&c. v. Ship New Jersey, 1 Peters. Adm. Rep. 223. (1806) the District Court of Pennsylvania held a different doctrine and said that sums paid abroad to mariners, or even here by the master, as well as monies advanced in foreign ports for necessaries supplied to the ship on her voyage are liens on the ship, and she is hypothecated therefor. But the court gave no opinion as to the effect of such advances at the port of outfit, or where the owners reside. And the court, in the above case, upon the ground that the above charges were liens in the hands of the master, directed them to be paid out of certain remnants and surplus remaining after the sale of the ship, by decree of the court for payment of mariners' wages.

subjecting the ship to such a claim. This privilege exists in *France* not only while the ship remains in the possession of the owner, but even after a sale to a third person, for some period of time (*q*). *Lord Mansfield* is reported to have said generally in a case, depending for judgment in the Court of King's Bench (*r*), that a person, who supplies a ship with necessaries, has not only the personal security of the master and owners, but also the security of the specific ship. But in a recent case (*s*), to which I have more than once had occasion to refer, *Lord Kenyon*, alluding to two cases, that will be presently mentioned, expressed a doubt whether the doctrine of *Lord Mansfield* on this subject was not too generally laid down; and [135] upon the view of the decisions, which I am about to quote, one of which was pronounced by *Lord Mansfield* himself, it appears that the Law of *England* has not adopted this rule of the Civil Law with regard to repairs and necessaries furnished here in *England*. A shipwright indeed, who has taken a ship into his own possession to repair it, may not be bound to part with the possession, until he is paid for the repairs, any more than a tailor, smith, or other artificer, in regard to the object of his particular trade. But a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not by the Law of *England* preferred to other creditors, nor have any par-

(*q*) It seems to be a year. *French Ordin.* Liv. 1. Tit. 12. *des prescriptions, &c.* Art. 3.

(*r*) *Rich v. Coe*, Cowp. 636. Trin. T. 17 *Geo.* 3. An expression of the same import was also used by his Lordship in the case of *Farmer v. Davis*, 1 Ter. Rep. K. B. 109.

(*s*) *Westerdell v. Dale*, 7 Ter. Rep. K. B. 312.

ticular claim or lien upon the ship itself for the recovery of their demands.

10. Thus where one *Clement* (*t*), who had supplied sails and other necessaries for the use of a ship in a port in *England*, instituted a suit in the Court of Ad-
[136] miralty against the persons, who were master and owner at the time of the supply, and also against the ship, and one *Hoare*, who had afterwards purchased the ship, the Court of King's Bench, on the application of *Hoare*, granted a prohibition to the Court of Admiralty, to stay the proceedings against him and the ship. Again (*u*), where one *Ballam* instituted a suit in the Admiralty against a *Norwegian* ship, for payment of the price of a cable and anchor delivered on board the ship to the master in the River *Thames*, and an application was made to the Court of King's Bench to prohibit the Court of Admiralty from proceeding in the cause, against which and in favour of the proceedings in the Admiralty it was argued, that the want of the cable and anchor was occasioned by stress of weather at sea, and that the party would be without remedy if a prohibition should be granted, because the master was dead, and the owners were foreigners; the Court of King's Bench thought the ship not liable to the suit; *first*, because it did not appear that the ship was in her

(*t*) *Hoare v. Clement*, 2 Show. 338. Hil. T. 35 and 36 Car. 2. It seems that the prohibition would have been general, if the master and former owner had applied for it, for the Court of Admiralty had no jurisdiction over the person in this case. See *Cradock's Case*, 2 Brownlowe 37, reported also in *Owen* 122, by the name of *Leigh v. Burleigh*, 7 Jas. 1. I have not cited this last case as an authority for the text, because it is not said in either of the books, that the suit in the Admiralty was against the *ship*, as well as the person.

(*u*) *Justin v. Ballam*. Mich. T. 1 *Anne*. Salk. 34. 2 Lord Raym. 805. Both reporters say that the Court awarded a prohibition, but the latter adds, that at the importunity of the defendant's counsel the plaintiff was ordered to declare. No subsequent proceedings are any where mentioned.

voyage, when she became in distress for want of a cable and anchor, *and at the time of the contract; secondly*, because there was no actual hypothecation; and said, that although by the maritime law every contract with the master of a ship implied an hypoth- [137] ecation, yet it was otherwise by the Law of *England*, unless expressly so agreed. And (*v*) where a ship had been sold, and the money brought into the Court of Chancery in a cause there depending, and upon inquiry into the nature and extent of the demands of the several parties in the cause upon the proceeds of the sale, it appeared, that the plaintiff, being master of the ship, had, by the desire of one of the defendants the owner, employed several tradesmen in *London* to do work to, and find provisions and materials for the ship, for which he (the master) had promised to pay, and of which he had been forced by suit at law to pay a part; *Sir Joseph Jeykyl*, the Master of the Rolls, declared, (and decreed accordingly) that this demand was not a lien on the ship, but that a demand of the master for wages paid by him to the mariners, and for money disbursed by him on the ship's account in the course of a foreign voyage, was a lien on the ship (1); and in this case it was said by the *Master of the Rolls* "That if a "ship be in the River *Thames*, and money be laid out "there, either in repairing, fitting out, new rigging, or "apparel of the ship, this is no charge upon the ship;

(*v*) *Watkinson v. Barnardiston*, 2 P. Wms. 367. 2 Eq. Ca. Ab. 512. A. D. 1726.

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(1) But see in note under p. 133. the case of Hussey v. Christie, &c. 9 East. 426, where the master's lien on the ship for these charges is denied.

"but the person thus employed, or who finds these ne-
"cessaries, must resort to the owner thereof for pay-
"ment; and in such a case, in a suit in the
[138] "Court of Admiralty to condemn the ship for
"non-payment of the money, the Courts of Law
"will grant a prohibition; and therefore if the owner,
"after money thus laid out, mortgages the ship, though
"it be to one, who has notice that the money was so
"laid out, and not paid; yet such mortgage is well
"entitled, without being liable for any of the money
"thus laid out for the benefit of the ship as aforesaid;
"and the ship is no more liable for this money, than a
"carpenter laying out money in the building of a house,
"has a lien upon the house in respect thereof; though
"by the Law of *Holland* he has; but this not being the
"Law of *England*, such carpenter must resort to those
"who employed him, or to the owner of the house, for
"his money. But it is true, that if at sea, where no
"treaty or contract can be made with the owner, the
"master employs any person to do work on the ship, or
"to new rig, or repair the same, this, for necessity and
"encouragement of trade, is a lien upon the ship, and
"in such case the master, by the maritime law, is al-
"lowed to hypothecate the ship."

11. Again were a ship was sold under the authority of the Court of Chancery, and a person, who had previously repaired it in *England* by order of the master, acting under the authority of the ship's husband, claimed the payment of his demand out of the money produced by the sail in a suit against the surviv- [139] ing part-owners, and the representatives of the others, who were dead; and it became necessary to determine whether the plaintiff's demand constituted a

lien upon the ship, because, if it did, he was entitled to payment according to the prayer of his bill: *Lord Chancellor Hardwicke* said, "Certainly by the maritime law "the master has power to hypothecate both ship and "cargo for repairs, &c. during the voyage; which ari- "ses from his authority as master, and the necessity "thereof during the voyage, without which both ship "and cargo would perish; therefore both that, and the "law of this country, admit such a power. But it is "different, where the ship is in port *infra corpus com-* "*itatus*, and the contract for repairs, &c. made on land "in *England*; then the rule of that law must prevail. "I know no case where the repairs, &c. whether it was "by part-owners, or sole owner, master or husbands, "have been held a charge or lien on the body of the "ship. *Watkinson v. Barnardiston*, 2 *Wms.* 367. being "a direct authority to the contrary; and if the ship in "the river *infra corpus comitatus* should be proceeded "against and stopped for such debt, the courts of law "would issue a prohibition, the contract being on land "and not arising from necessity." And his Lordship dismissed the bill so far as it sought relief against the body of the ship, or the money arising by the sale thereof: but, expressing a doubt, as to the personal charge upon the owners in such a case, directed a trial
[140] at law upon that question (*u*), as I have already mentioned (*w*).

12. And in another case which happened very soon afterwards, where a person having repaired a ship here, and delivered it to his employer, who has become a bankrupt, had obtained possession of the money, for which the ship had been sold, and insisted before *Lord*

(*u*) *Buxton v. Snee*, 1 *Ves.* 154. (*w*) *Ante*, page 127.
Nov. 1748.

Chancellor Hardwicke, that he had a specific lien on the ship for the repairs, and was not obliged to prove his demand as a debt under the commission; the *Lord Chancellor* said, that although the Law of *Holland* gave a person, who repaired a house, or ship, a specific lien, there was no such law in *England*, and that he must account to the assignees of the bankrupt for the money in his hands arising from the sale of the ship, and come in under the commission for the debt due to him for repairs; and his Lordship made an order accordingly (*x*).

13. And in a case (*y*) that came before the Court of King's Bench very soon after the determination of the particular case, in which *Lord Mansfield* is reported to have delivered the doctrine before quoted; wherein the master of a ship, of which the owner was become bankrupt, insisted upon a right to retain the ship from the assignees of the bankrupt, as a security both for his own wages, and for the expence of repairs, [141] stores, and provisions ordered by himself, and for which he was liable to pay, and after a demand made of the ship by the assignees had actually paid, *Lord Mansfield* said, "As to the stores and repairs, it is a "strong answer to the claim, that, when the demand "was made by the assignees, the master had not paid. "But if there was any lien originally, it was in the carpen- "ter: the master could not by paying him be in a bet- "ter situation than his, and *he* had parted with the pos- "session, so that he had given up his lien, if he ever "had one. The other creditors had none. Work done "for a ship in *England* is supposed to be on the person- "al credit of the employer. In foreign parts the mas- "ter may hypothecate the ship."

(*x*) *Ex parte Shank & others*, 1 Atkins, 234. *August*, 1758.

(*y*) *Wilkins v. Carmichael*, Hil. T. 19 *Geo.* 3 Doug. 101.

14. And LASTLY, in a case (*z*), which was brought by appeal from the Court of Session in *Scotland* to the *British* House of Lords, the Lords determined that the persons, who had repaired and furnished a ship in *Scotland*, the place of the owner's residence, had no claim upon the value of the ship itself for the payment of their demands. The owners of the ship had become bankrupts, and several persons, who had repaired and furnished it at different periods, instituted a suit against the trustee of the bankrupt's estate, claiming
[142] payment out of the proceeds of the sale of the ship in exclusion of the other creditors of the bankrupt, and insisting that all of them, or at least those, whose demands arose since the last voyage made by the ship, and in order to fit her out for another voyage, had by the law of *Scotland*, and of other *European* nations, *England* only excepted, a right of hypothecation or preference for the amount of their respective demands. The cause was heard and re-heard several times in *Scotland*, and different decisions pronounced there; some in favour of the claim, and others against it. The ultimate decision in *Scotland* was against the claim; founded principally, as it seems upon a desire to render the law of *Scotland* conformable to the law of *England* on this subject (*a*); for such a claim had been frequently allowed in the Courts of *Scotland* during a period of four-score years preceding this cause; and the decision was affirmed by the house of Lords on the appeal.

(*z*) *Wood & others v. Hamilton*, decided in *Dom. Proc.* 15th *June*, 1789. The printed papers are drawn up with great care and learning on both sides, and contain much valuable information.

(*a*) In the case of *Jamieson & others v. Laurie*, cited *post*, part 3. chap. 1. sect. 10. this is expressly said to have been the ground of the decision. *Dr. Wynne's* opinion as to the *English* law, was taken in the course of the proceedings for the information of the *Scotch* Judges.

I have detailed these cases with the more particularity, in order to prevent any mistake from the general doctrine delivered by *Lord Mansfield* in the case of *Rich v. Coe*, which has sometimes been cited as an authority up to the full extent of the terms, in which [143] it was expressed (1).

14. *b.* There is however a late determination of the Court of Admiralty, that should be mentioned in this place. An *American* ship was supplied in the river *Thames*, by certain merchants of *London*, with stores and ammunition for a voyage to *Venice*, and, having performed the voyage and returned to *London*, was sold under a decree of the Court in a suit instituted by the mariners for their wages. After payment of the wages, a surplus remained in the registry of the Court. The

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(1) It does not appear that it has ever been held in the courts of the U. S., that shipwrights and furnishers of supplies to ships, while in the ports of the U. S., have not a lien on the ships, or right to admiralty process to recover the amounts due them. The question has not to my knowledge arisen in the Supreme Court of the U. S., but in the District Court of Maryland, after a very learned discussion, *Winchester J.* decided that a shipwright by the maritime law has a lien on the ship for repairs done and materials found by him, while the ship is in a port of the U. S. Stevens v. The Ship Sandwich, 1 Peters. Rep. 233. note. The same opinion was given by *Peters J.* in Pennsylvania, in Gardner, &c. v. The ship New Jersey, 1 Peters. Rep. 223. See also 1 Roll. Abr. 533. l. 15. Cro. Car. 296.

The legislature of New York have expresly provided that shipwrights, material men, and suppliers of ships shall have a lien on the ships for the amount of their debts, where the ships are owned *by any persons not resident within the state.* Act. 10. August, 1798.

master had returned to *America* and died ; and the owner was insolvent there. The merchants applied to the Court for payment of their demand out of this surplus : and in support of their application a distinction was taken between English and foreign ships. The learned Judge of the Court, after having had the cases looked into, said he found it had continued to be the practice of the Court to allow persons of this description to sue against proceeds remaining in the registry, notwithstanding prohibitions had been obtained on original suits instituted by them ; and he referred to a particular case of the ship *Adventure* in the year 1763 : and decreed that payment should be made according to the application (*b*). (1)

It is observable that there was not in this case any person representing the owner to object to the [144] application. It appears by the report that the proceeds had been previously attached on the part of a creditor, and that the attachment had been removed before the decree, but no particulars relating to it are mentioned.

In the case of the same ship, a person who had acted as agent and broker to the ship in this country, afterwards applied by petition for payment of the balance of his account ; but the petition was rejected, by reason of the general and unsettled nature of the account, which was thought more fit for the Court of Chancery, where alone cross demands could be investigated.

(*b*) The JOHN, *Jackson*, 3 Rob. A. R. 288.

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(1) A similar decision in principle was made in Gardner, &c. v. The Ship New Jersey above cited.

15. We have seen by several of the preceding cases, that the master may in foreign parts hypothecate the ship: and I propose in the next place to consider the nature of those instruments of contract, by which a ship itself is expressly made security, and pledged by the master, for the repayment of a debt contracted with relation to it. It should be observed, that wherever the master may pledge the ship, he may pledge the freight also (*c*).

These contracts are usually called contracts by *bottomry*, the bottom or keel of the ship being figuratively used to express the whole body thereof; sometimes also but inaccurately, money lent in this [145] manner is said to run at *respondentia*; for that word properly applies to the loan of money upon merchandize laden on board a ship, the repayment whereof is made to depend upon the safe arrival of the merchandize at the destined port. In like manner the repayment of money lent on bottomry, does in general depend upon the prosperous conclusion of the voyage; and as the lender sustains the hazard of the voyage, he receives upon its happy termination a greater price or premium for his money, than the rate of interest allowed by law in ordinary cases. The premium paid on these occasions, depends wholly on the contract of the parties, and consequently varies according to the nature of the adventure. And as the master of the ship may, under certain circumstances, pledge the ship by a bottomry contract, so also may the owners or part-owners in any case, to the extent of their respective interests; and this they not unfrequently do, in order to raise money for

(c) The GRATITUDINE, *Mazzola*, 3 Rob. A. R. 240. and the JACOB, *Baer*, 4 Rob. A. R. 245. See as to the extent of an hypothecation of the freight, the last section of this chapter.

the out-fit, when prudence dictates the propriety of such a measure, or the want of personal credit compels them to have recourse to it. The origin of these contracts is certainly very remote, and cannot now be accurately ascertained. It is said by a very learned writer (*d*), that they took their rise from the practice of allowing the master to hypothecate the ship in a foreign country, in order to raise money to refit. But this opin-
[146] ion may well be doubted; for although the practice of lending money upon maritime risks at a high premium was well known to the *Romans* before the time of *Justinian*, yet in those titles of the Digest and the Code (*e*), which expressly treat of this subject, no mention is made of contracts of this nature entered into by the *master* of a ship *in that character*, according to the practice which has since universally prevailed. And except for the purpose of securing the payment of maritime interest, actual hypothecation was not necessary to give the creditor a claim upon the ship, as I have already shewn. This point however is rather a matter of speculative curiosity than of useful research, and therefore I shall pursue it no further.

16. The consideration of these contracts, when made by the owners or part-owners themselves, does not properly belong to this place; their legality, and the risks, which the lender is to incur according to general rules, are very ably treated by *Mr. Park* and *Mr. Serjeant Marshall* in their chapters on bottomry and respondentia. I shall only mention such circumstances relating to them, as are connected with the subject of hypothecation by the *master*.

(*d*) 2 Black. Com. 457.

(*e*) *De Nautico Fœnore. Dig.* 22. 2. and *Codex*, 4. 33. See on this subject, *Park*, chap. 21. *Guidon* chap 18. *Emerigon*, tom. 2. p. 380. and stat. 6 *Geo.* 1. *c.* 18. *s.* 12.

17. The name of *bottomry* has been sometimes incorrectly applied to a contract, by the terms of which the ship itself is not pledged as a securi- [147] ty, but the repayment of money with a high premium for the risk, is made to depend upon the success of a voyage (*f*). This is rather a loan upon a particular adventure to be made by a particular ship, than a loan upon the ship; and of course the lender has only the personal security of the borrower for the due performance of the contract. And it seems that loans have sometimes been made in this manner, and probably also with a pledge of the ship itself, to an amount exceeding the value of the borrower's interest in the ship, and such a contract is still legal in this country in all cases, except the case of ships belonging to the King's subjects bound to or from the *East-Indies;* as to which the Legislature has enacted, "That all sums of "money lent on bottomry or at respondentia, upon any "ship or ships belonging to his Majesty's subjects "bound to or from the *East-Indies*, shall be lent only "on the ship, or on the merchandize or effects laden, "or to be laden, on board of such ship, and shall be so "expressed in the condition of the bond, and the bene- "fit of salvage shall be allowed to the lender, his agents "or assigns, who alone shall have a right to make as- "surance on the money so lent, and no borrower of "money on bottomry, or at respondentia as aforesaid,

"shall recover more on any assurance, than the [148] "value of his interest on the ship, or in the

"merchandizes or effects laden on board of "such ship, exclusive of the money so borrowed, and

(*f*) Three forms of bonds of this sort are printed in the *Appendix* to the *Treatise of the Dominion of the Sea, and Body of Sea Laws*, p. 659, &c.

"in case it shall appear that the value of his share in "the ship, or in the merchandizes or effects laden on "board, doth not amount to the full sum or sums he "hath borrowed as aforesaid, such borrower shall be "responsible to the lender for so much of the money "borrowed, as he hath not laid out on the ship or mer-"chandizes laden thereon, with lawful interest for the "same, together with the assurance, and all other "charges thereon, in the proportion the money not laid "out shall bear to the whole money lent, notwithstand-"ing the ship and merchandizes be totally lost (*g*)." This statute was introduced for the protection of the trade of the *East-India Company;* and its rules must be complied with in the case of bottomry by the *master.*

18. By a former statute all contracts or agreements made by any of his Majesty's subjects, or any persons in trust for them, upon the loan of any money by way of *bottomry* on any ship in the service of *foreigners* bound or designed to trade within the limits of the *East-India Company's* charter, or of supplying such ships with any provisions, stores or necessaries, are made wholly void (*h*). This statute also applies to contracts of bottomry by the *master.*

19. With regard however to contracts of this [149] sort, made by the owners themselves in this country before the beginning of a voyage, by the terms of which the ship is pledged as a security, it should be observed, that the lender has not the same convenient and advantageous remedy by suit in the Admiralty against the ship (*i*), as he has in the case of hypotheca-

(*g*) 19 *Geo.* 2. *c.* 37. *s.* 5.

(*h*) 7 *Geo.* 1. *stat.* 1. *c* 21 *s.* 2.

(*i*) Dict. accord. by *Holt* Ch. J. in *Johnson v. Shippen,* 2 Ld. Ray. 983. and by *Lawrence* J. in the case of *Busk v. Fearon,* B. R. Mich. T. 44 *Geo.* 3. This case is shortly reported in 4 East 319. but this dictum of the learned Judge is not noticed. It was a case of a loan in England at respondentia, and the parties were British subjects.

tion for necessaries by the master in a foreign port: and if the contract relate to a *British* ship, and purport to be, either a present assignment of a ship liable to be defeated on repayment of the money due at the end of the voyage, or a future assignment to take effect only upon failure of such payment, it seems that a compliance with the provisions of the register acts, mentioned in a preceding chapter with regard to the transfer of property in ships, is essential to the validity of the contract (1).

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(1) With regard to bonds of the kind mentioned in this section, I am not aware of any direct decisions in the Supreme Court of the U. S., respecting the admiralty jurisdiction. But in the case of Wilmer v. The Smilax, 2 Peters. Rep. 295. in the District Court of Maryland, *Winchester J.* sustained the jurisdiction. The case was on a bottomry bond, which was executed by the owner, and hazarded on a specified voyage, but by the default of the owner the voyage never was undertaken or accomplished. It does not appear by the report, what was the form of the instrument, whether it contained an express pledge of the ship or not; but the learned Judge was of opinion it was a good bottomry contract, and that a suit lay in the admiralty to recover the amount due on it. He said "the con-"tract of bottomry may be either for a limited time or upon "a whole voyage, and in both, the lender has the same securi-"ties, to wit, the person of the borrower, and *the thing on which* "*it is loaned*, and he runs the same risk, to wit, of a total loss, "if his money is effectually hazarded." "The contract of insur-"ance by its terms imports, that the obligation on the under-"writers to make good a loss, arises only when that loss hap-"pens." "The contract of bottomry on the other hand, im-"plies *an immediate pledge* and security defeasible on a future "event; the first is a personal contract simply, the latter *a con-*

19. *b.* Neither does there seem any mode, by which a person, who advances money at *respondentia* upon goods laden and to be laden on board a ship on an outward and homeward voyage, can resort for the payment of his debt to the specific goods that may be brought

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" *tract of pledge* as well as personal security; in cases therefore " between the insurer and the lender upon bottomry, the latter is " preferred." " The very term bottomry imports an hypothe- " cation by the maritime law. If the vessel had duly proceeded " upon the stipulated voyage and performed it, it is not doubt- " ed that the libellant's claim would be sustainable." And the learned judge concluded by decreeing in favour of the libellant.

So in a case in the Court of Admiralty in Ireland, where a part owner of a ship, *for the purchase of his moiety of the ship, and for other purposes respecting the same*, executed a bottomry bond upon the hull of the ship then lying in the port of Bristol, on a voyage from thence to Milford, and thence to Wexford, and on process in the Admiralty to recover the amount of the bond, it was argued, 1. that this was a bond merely depending upon the *risk*, and not pledging the ship, there being no words found in it which could be construed to pledge the ship, and therefore was not suable in the Admiralty, but at common law; and, 2. that supposing the ship pledged, yet it did not follow that the Admiralty had jurisdiction, for the contract must be a marine contract, and for a maritime cause, and in the present case it did not appear to be either; and that it did not appear that the loan was for the repairs or use of the ship, nor that the repayment was to depend upon any risk to be run by the ship. But the Court were of opinion that the ship was hypothecated; for the party run the risk on the hull of the ship, and it would have been unnecessary to have mentioned the hull of the ship otherwise; that the mere form of the bottomry bond did not

back (*k*). In a case of money lent to the mas-
[150] ter of an *East-India* ship, who executed a bond in the form (*l*) commonly used on such occasions, and having taken out goods from this country

(*k*) 2 Black. Com. 458. (*l*) See Appendix, No. III.

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signify, if the meaning of the parties was clear. Corish v. The Murphy, 2 Brown. Civ. & Adm. Law, Appx. 530. This case seems to admit that an express pledge of the ship is not necessary, and that a bottomry bond, when executed by an owner, is recoverable in the Admiralty, even though executed within the realm.

In the case of Blaine v. The Ship Charles Carter, 4 Cranch. Rep. 328., where there were two bottomry bonds, one executed by the master in London, on a voyage of the ship to the U. S., and the other by the owner in the U. S., on a voyage to Europe, the question as to the jurisdiction of the Court on the second bond was not made by counsel, and the case being settled upon other independent facts, the Court gave no opinion directly on the point. But in delivering the judgment of the Court, Chase J. said "a bottomry bond made by the master vests no absolute indefeasible interest in the ship, on which it is founded, "but gives a claim upon her which may be enforced with all "the expedition and efficacy of the admiralty process. This "rule is expressly laid down in the books, and will be found "consistent with the principle of the civil law, upon which "the contract of bottomry is held to give a claim upon the "ship. *In the case of a bottomry bond executed by an owner in "his own place of residence, the same reason does not exist for giving an implied admiralty claim upon the bottom*, for it is in his "power to execute an express transfer or mortgage." It may be added that the District Court in this case supported the jurisdiction, and its decision in this respect is not directly impugned.

and sold them in *India*, and brought back others purchased there with the proceeds of the first, became a bankrupt before he had repaid the loan, and while part of the goods and the money produced by the sale of another part remained in the hands of the *East-India Company*, in whose warehouses they were deposited for sale, according to the rules of that trade; the Court of Chancery lately sent the following question for the determination of the Court of King's Bench, viz. "whether the lender had by law in respect of the money remaining due to him on the bond, any lien upon, or interest in, the money or goods remaining in the hands of the Company, or either of them, and whether the same, or either of them, were by law liable to satisfy what so remained due." The Court of King's Bench determined the question in the negative (*m*). It may be observed, that the instrument used on this occasion does not contain a direct and formal pledge of the goods (1).

(*m*) *Busk v. Fearon & others*, 4 East. 319. See *Glover v. Black*, 3 Burr. 1394.

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(1) In this case Lord Ellenborough said, "This appears to be "a contract, not of a universal nature and form, but depending "upon the particular form of the instrument, varying in different countries. In Spain it seems more like a direct hypothecation of the goods, *which* would make all the difference in "the construction. But nothing of this sort is to be found in "this instrument. In the introductory part, indeed, of the condition, the money is stated to be lent on the goods; but that "is explained in the subsequent part, and shown to be only a "pledge for the purpose of salvage. And no action could be "maintained by the obligee to recover possession of these goods

20. A contract of hypothecation made by the master does not transfer the property of the ship, but only gives the creditor a privilege or claim upon it, to be carried into effect by legal process (2).

" from the borrower, or any other having also a claim on them ; " for, admitting that the borrower and lender were even part- " ners in them, the latter could not maintain trover against " the other. We must construe the contract upon the words " of this bond, such as these parties have made use of; for it is " this contract, and not of a general nature, to be governed " by general usage, that they have entered into. If indeed " there were any word used of doubtful signification, it might " be construed by general usage. But here the terms of the " bond are plain and intelligible, and amount only to a personal " obligation on the borrower." Mr. Justice Lawrence added, " if the lender were enabled to take possession of the goods " from the borrower, the very object of the contract would be " defeated, for how then would the latter be enabled to carry " on the adventure, or sell the goods, which he brought home, " out of which the loan is to be repaid." 4 East. 319.

But Pothier says, (p. 58. 60.) that by the laws of France the lender of money on goods, has the goods pledged to him for repayment; and Bynkershook (Quest. Jur. Pris. p. 506. &c. lib. 3. ch. 16.) thinks that it makes no difference whether the form of the bond give to the lender the pledge of the goods in terms or not, because he considers that the nature of the contract gives him that security. Cited 4 East. 323. 324. In the Jacob, 4 Rob. Ad. Rep. 245, where the freight was pledged by a bottomry bond, Sir W. Scott held that the freight must be, as against the owners, applied for this purpose, and decreed accordingly. See post, sect. 30. of this chapter. And 2 Brown. Civ. & Adm. Law, 198.

(2) The same doctrine was held in 4 Cranch's Rep. 328.

21. It is obvious that a loan of money upon [151] bottomry, while it relieves the owner from many of the perils of a maritime adventure, deprives him also of a great part of the profits of a successful voyage: and therefore in the place of the owner's residence, where they may exercise their own judgment upon the propriety of borrowing money in this manner, the master of the ship is by the maritime law of all states precluded from doing it, so as to bind the interest of his owners, without their consent (*n*).

22. The meaning of the words "place of residence" (*la demeure des proprietaires*) has given occasion to some questions in *France*. With us I apprehend the whole of *England* is considered for this purpose as the residence of an *Englishman*; at least before the commencement of a voyage. But *Ireland* has been held to by a foreign country, in the case of an *English* ship, hypothecated by the master there in course of a voyage (*o*). And in a late case (*p*) the Court of Admiralty granted its warrant to arrest a ship on a bottomry bond executed at *Jersey* for the repairs and outfit, by a person who was both master and owner. In the bond this person was described [152] as of *London*, and the ship as of *Jersey*. The authority of the Court to hold cognizance of the cause does not appear to have been disputed by the owner; and in the result the ship was sold under a decree of the court (*q*).

(*n*) *Hanseatic Ordinance*, art. 58. *Hanseatic Ordinance*, of 1614, tit. 6. art. 1. *French Ordinance*, liv. 2. tit. 1. *Du Capitaine*, art. 17. and liv. 3. tit. 5. *Des Contrats a grosse*, art. 8. *Emerigon*, tom. 2. p. 424. *Molloy*, book 2. chap. 11. sect. 11. *Weskett*, tit. *Bottomry*, sect. 20. 23. *Lister v. Baxter*, 2 Stra. 695.

(*o*) In *Menetone v. Gibbons*, 3 Ter. Rep. K. B. 267, the hypothecation was made in *Ireland*.

(*p*) The BARBARA, *Chegwin*, 4 Rob. A. R. 1.

(*q*) The BARBARA, *Chegwin* 4 Rob. A. R. 2.

With regard to a *foreign country*, the rule appears to be that if a master of a vessel has occasion for money to repair or victual his ship, or for any other purpose necessary to enable him to complete the enterprize, in which she is engaged, whether the occasion arises from any extraordinary peril or misfortune, or from the ordinary course of the adventure, he may, if he cannot otherwise obtain it, borrow money on bottomry, at maritime interest, and pledge the ship, and the freight to be earned in the voyage, for repayment at the termination of the voyage. When this is done, the owners are never personally responsible (*r*). The remedy of the lender is against the *master* or the ship.

23. But if the person who thus advances money, does not chuse to take upon himself the risk of the ship's return, and will be content not to demand maritime interest, there seems to be no reason why the master should not pledge both the ship itself, and the personal credit of the owner. And in a case, which [153] came before *Sir John Strange*, Master of the Rolls, wherein a man, who had advanced money to refit a ship in distress at *Jamaica*, and had taken from the master both a deed of hypothecation of the ship, and bills of exchange upon the principal owner in *England*, for the amount of the sum advanced, claimed payment of the owners personally, the ship having been captured on the voyage home; it was decreed that he should recover the money; and it is said also, that the ship was thought to be well hypothecated (*s*).

24. There is no settled form of contract in use

(*r*) *Molloy*, book 2. chap. 11. sect. 11.

(*s*) *Samson v. Bragington*, 1 Ves. 443. It appears by the entry of the proceedings in the Register's book, that the defendant *Bragington* said in his answer, that he believed 20 *per cent.* was added to the actual expence, to make up the sum, for which the deed of hypothecation

on these occasions (*t*); sometimes an instrument in the form of a bond, at others in the form of a bill of sale, at others of a different shape, is made use of. But whatever be the form; the occasion of borrowing, the sum, the premium, the ship, the voyage, the risks to be borne by the lender, and the subjection of the ship itself as security for the payment, all usually are, and properly ought to be expressed. Upon the arrival of the ship in this coun- [154] try, if the loan is not repaid within the time prescribed, the agent of the lender applies to the Court of Admiralty, with the instrument of contract, and a proper affidavit of the facts, and obtains a warrant to arrest the ship, and cite all persons interested to appear before the Court, if they think proper to do so (*u*). If, in the course of the proceedings it becomes necessary to sell the ship, the Court decrees a sale to be made under the direction of its own commissioners, and afterwards distributes the proceeds among the different claimants, as justice requires: and this may be done, if the owners or persons interested in the ship, do not appear at the times appointed by the Court; otherwise their absence or default would occasion a failure of justice.

25. This proceeding *in rem*, against the ship itself, is the proper and peculiar province of the Court of Admiralty. The jurisdiction of the Courts of Common Law is exercised by suit against the person only (except in some particular cases of forfeiture, or demands of the

was given; but this does not seem to have been proved. The deed of hypothecation, as stated in the plaintiff's bill, was for payment absolutely, and not upon condition of the ship's safe arrival in *England*, and the deed was proved in the cause.

(*t*) The reader will find in the *appendix*, two different forms used in the same voyage, one at *Bombay*, the other at the *Cape of Good Hope*. In *Johnson v. Shippen*, 2 Ld. Raym. 982. the hypothecation was by *bill of sale*. In *Menetone v. Gibbons*, 3 Ter Rep. K. B. 267. it was by *bond*.

(*u*) The citation is generally made by posting a copy of the warrant upon some part of the ship.

crown) although in many cases judgment is ultimately pronounced for the recovery of the subject of dispute in specie.

26. The legality of the proceedings in the Court of Admiralty, in case of such hypothecation by the [155] master in a *foreign country*, which are calculated to administer justice in a manner that cannot be effected by the Courts at Westminster Hall, has been recognized by those Courts in a variety of cases, and is now so fully established, that it appears unnecessary to mention their particular circumstances, and I shall therefore merely refer to them in a note (*v*), in order to enable the learned reader to consult them with facility, if he has occasion to do so.

27. It is however equally clear, that the master cannot charge the ship by any instrument of hypothecation for any debt of his own. The attempt would be a fraud in him: and those, who should aid him to do so, would be parties to the fraud; and therefore the fairness of the loan may be made the subject of inquiry and contest, if justice require it. But provided the ship have been in a state of want, and the money fairly advanced to the master to relieve her, his subsequent misapplication of it will not deprive the lender of the benefit of his security (*w*). (1)

(*v*) *Bridgman's case*, 12 Jas. 1. Hob. 11 Moor, 918. 1 Ro. Ab. 530. *Scarborough v. Lyrus*. 3 Car. 1. Latch, 252. Noy, 95. *Corset v. Husely*, 1 W. and M. Comb. 135. Rep. temp. Holt, 48. *Benzen v. Jefferies*, 8 & 9. W. 3. 1 Ld. Raym. 152. *Johnson v. Shippen*, 2 Ann. 1 Ld. Raym. 982. Salk. 35. 6 Mod. 79. Rep. temp. Holt, 48. *Lister v. Baxter*, 12 *Geo.* 1 Stra. 695. *Menetone v. Gibbons*, 29 *Geo.* 3. 3 Ter. Rep. K. B. 267.

(*w*) *Dig.* 14. 1. 7. 2. *Molloy*, book 2. ch. 11. sect. 11. See also the judgment of *Sir W. Scott* in the case of the GRATITUDINE, *Mazzolla*, 3 Rob. A. R. 272.

(1) Nor can the master hypothecate the ship, if he has goods of his owner or *his own* sufficient to meet the necessary

As an illustration of this rule, that the master cannot bind the ship for a debt of his own, [156] the following case is related by *Loccenius* (*x*). The master of a ship being in a *Spanish* port, and having exposed the ship to seizure by his neglect to comply with a particular regulation of the country, entered into an agreement with a person, who was supposed to possess sufficient influence to obtain the restitution of the ship, to pay him a very considerable sum with maritime interest, if he should procure the restitution of the ship, and she should afterwards return home in safety: and for securing the payment executed an instrument in the nature of a bottomry bond. By the interest of the person, with whom the agreement was made, the ship was restored; and afterwards returned home in safety; and

(*x*) Lib. 2. c. 6. s. 12.

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expences; nor if the owner have agents or consignees at the ports, who have funds or are bound to afford means for this purpose. For the right exists only in case of necessity. Rucher & Co. v. Conyngham, 2 Peters. Adm. Rep. 295. In the case of Cupisino v. Perez, 2 Dall. Rep. 194, the Supreme Court of Pennsylvania held the same doctrine, that the master cannot hypothecate, while there are goods *of his own*, or of his owners on board. But this doctrine has been doubted. Lex. merc. Amer. p. 355. But however this may be, in cases of necessity and where the master cannot otherwise procure the money, he may borrow it on bottomry and hypothecate the ship for the repayment, as well at the port of destination as at any other foreign port. Reade v. The Commercial Insurance Company, 3 John. Rep. 352. Nor does it make any difference that the ship is chartered, and the master is appointed by the charterers. Breed, &c. v. Ship Venus, Dist. Court of Massachusetts, 1805, MSS.

he instituted a suit against the ship upon the instrument executed to him by the master. But it was determined that the ship and owners were not chargeable by this contract.

28. It should be observed of these securities in general, that if they are given at different periods of a voyage, and the value of the ship is insufficient to discharge them all, the last in point of date is entitled to priority of payment, because the last loan furnished the means of preserving the ship, and without it the [157] former lenders would entirely have lost their security; *salvam fecit totius pignoris causam* (*y*).

29. The value of the ship and freight, supposing the ship to reach the place of destination, may sometimes be thought an insufficient security for the amount of the expences of the repairs, &c. necessary to put the ship into a condition to proceed with its cargo and perform the voyage. In such a case of necessity, it has been always held, that the master, if he cannot otherwise obtain money, may sell a part of his cargo to enable him to convey the residue to the destined port (*z*); and it has lately been very solemnly decided in the Court of Admiralty, that the master may hypothecate the *cargo* as well as the ship and freight (*a*). An *Imperial* ship coming from the *Mediterranean* with a cargo of fruit to *London*, was driven into *Lisbon* to refit. An estimate and survey were made under the authority of a Court at *Lisbon*, and it was declared by the surveyors that the

(*y*) *Bynkershook. Quest. Jur. Pub. lib.* 1. c. 19.
(*z*) Post, part 3. chap. 3. sect. 8.
(*a*) The GRATITUDINE, *Mazzola*, 3 Rob. A. R. 240.* The instrument of hypothecation used on this occasion will be found in the Appendix to this Treatise, No. IV.

* And post, part 3. ch. 3. sect. 8.

ship was of sufficient value to warrant the repairs. The sum, for which the deed of hypothecation was executed, exceeded the estimate of the ship in its damaged condition, and of the freight, by a sum, which was supposed to be about equal to the charge, that would fall upon the cargo for unloading, warehousing, &c. The ship arrived at *London ;* and the loan not being [158] discharged, the creditor instituted a suit in the Court of Admiralty against the ship and cargo. The ship produced considerably less than its estimated value, on account of its being a foreign ship, and the impossibility of obtaining a register for it. It was admitted, that the question as to the validity of the hypothecation of the cargo had never been actually contested and decided in this country ; but several precedents of proceedings in the Court upon similar cases were found among the records of the Court, and it was agreed, that the practice of hypothecating the cargo in such cases was frequent among merchants. It did not appear whether or no the master had an opportunity of sending the cargo by another ship : but the learned Judge of the Court held that, according to all the authorities on the subject of transhipment, the master was not *bound* to tranship, and thinking, upon the view of all the circumstances of the case, that the master had acted for the best according to the appearance of things at the time, decided that the hypothecation of the cargo was valid ; considering the hypothecation of *the whole* to be both in its principle, and in the consequences, that might ordinarily result from it, exactly analogous to the sale of *a part.* On account of the great importance of the ques-

tion, the learned Judge invited the parties to bring [159] it by appeal before another tribunal (1).

30. It has been observed that wherever the master may pledge the ship, he may pledge the freight also. A question upon the extent of such a pledge has lately been decided in the Court of Admiralty (*b*). The master of a *Hamburgh* ship, being at *Baltimore*, and about to sail for *Cork*, executed a bottomry bond, purporting to bind the ship and her freight, in general

(*b*) The JACOB, *Baer*, 4 Rob. Ad. Rep. 245.

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(1) In the United Insurance Company v. Scott, &c. 1 John Rep. 106, the right of the master to sell the cargo, although shipped on freight, was fully recognized by the Court. Kent. C.J. said "the master *may sell a part, or hypothecate the whole of the* "*cargo* pending the voyage, and in a case of necessity, and for "such sale the owner of the vessel will be responsible." But the right of the master so to do is at an end, when the cargo has arrived at its port of destination. The master's authority over it in his character of master is then gone. The cargo is then in judgment of law in possession of the consignees, and it matters not that the master is wholly or in part the consignee. If he then as consignee, apply the cargo or its proceeds for the necessities of the ship, he is responsible over to the owners of the cargo for this appropriation, as for a breach of trust. id. ibid. See also, as to the right to sell and hypothecate cargo, Rucher & Co. v. Conyngham, 2 Peters. Adm. Rep. 295. But, the master's power to hypothecate the ship at the *port of destination* is unquestionable. 3 John. Rep. 352. But the master has no general authority to sell the cargo in a case where the ship is disabled from prosecuting the voyage ; nor can he acquire a right by application to a vice-admiralty court, and selling under its authority. Hunter v. Prinsep, 10 East. 378. & post. part 3. ch. 3. s. 8. 9.

terms, neither expressly confined to the freight of the present voyage, nor extended to future adventures. The ship sailed to *Dublin* instead of *Cork*, and thereby the holder of the bond lost the opportunity of instituting proceedings upon it at that time, and the freight was accounted for to the owners, though the deviation did not appear to have been made with this view. From *Dublin* the ship sailed again to *America*, and from thence to *London*, at which latter place the holder procured the ship to be sold under the authority of the Court of Admiralty; and the produce being insufficient to discharge the bond, he petitioned the Court to have the freight of the last voyage applied to that purpose. The freight was then in the hands of the agent of the owners: it was objected, that such a bond created a lien upon the freight of the existing voyage only, but the learned Judge of the Court, adverting to the fact of the freight of both voyages having come to the account of the owners, granted the prayer of the petition; at the same time, desiring "not to be understood as laying
"down any general rule as applicable to all cir- [160]
"cumstances and all cases, where any third
"party might have become interested in the freight of
"the subsequent voyage." (1)

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(1) The master may, in case the ship be chartered, and he be appointed by the charterers, hypothecate the ship, as has been before stated. And the bond may in such case be made to the charterers, who thereby acquire all the legal rights of bottomry, notwithstanding there is a covenant in the charter-party, that the owner will keep the ship in repair, &c.; for this does not deprive them of securing to themselves, by any other means, any advances made on account of the ship. And therefore

where a ship was so chartered on a voyage to Bristol, in England, and back to Boston, and on the voyage from Bristol, the ship was compelled to go into Kinsale in Ireland to refit, and there the necessary sum was advanced by a person connected in business with the charterers, and a bottomry bond taken in their name for the amount, and afterwards the ship and freight were libelled in the District Court of Massachusetts, *Davis J.* decreed in favour of the bond. And the learned Judge said, that he did not find any authority, either from decided cases or general principles to introduce the limitations contended for in that case, either as to the rights of the master or the charterers. That the master, although appointed by the charterers, must be considered as approved by the owner, and had the same authority as if appointed by him, and that although the charterers might have advanced their money, and have recovered the amount on the covenant in the charter-party, yet they were not bound so to do; and by entering into the bottomry contract, they waved their remedy on the charter-party for the advance so made. Breed, &c. v. Ship Venus, 1805, MSS. ante 155, note.

But although a ship be well bottomed by the master, yet it does not follow that the lender on bottomry is entitled to the marine interest in all cases. If the voyage has not commenced, by default of the owner, although his right to admiralty process is not devested, yet he is not entitled in ordinary cases to the full marine interest, for the court of admiralty may moderate, at their discretion, the marine interest, in proportion to the actual hazard incurred by the lender. Wilmer v. the Smilax, Maryland District Court, 1804, 2 Peters. Adm. Rep. 295. So where the ship and cargo are owned by the same persons, if the advances are made by a consignee or agent having funds in his hands, or usually giving credit to the owner, or under circumstances that shew he made the advances upon the personal responsibility of the owner, the court will not allow the marine interest. Rucher & Co. v. Conyngham, 2 Peters. Adm. Rep. 295.

So if such consignee has in any way taken advantage of the party's situation, or diverted the funds in his hands to other objects, which, though consistent with the owner's orders, are not indispensible. Reade v. The Commercial Insurance Company, 3 John. Rep. 352. But it must not be considered from these cases, that such a consignee may not, under circumstances, become the valid holder of a bottomry bond. A consignee not in the habit of dealing with or crediting the owner, and not having any goods, funds, or security at the time, seems under no obligation to risk his property without the usual and adequate compensation and security. 2 Peters. Rep. 225. So the Consolato del Mare, art. 104. (3 Rob. 240.) directs that if the merchant is present, having money, he shall lend it; if he has not money, the master may sell part of the cargo, *giving him a lien on the ship for his security.* The merchant here alluded to, is the owner of the goods, and his rights do not seem to vary from those of a consignee of the cargo, *when freighted.*

But a bottomry bond on an enemy's ship, is not an interest which is protected on capture. And therefore where in a time of peace, a British merchant had taken a bottomry bond on a French ship, which was captured in the subsequent war, *Sir W. Scott* held that the claim on the ship was invalidated by the capture and at an end. The Tobago, 5 Rob. Adm. 194.

A bottomry bond is preferred to every other claim or privilege for the voyage on which it is founded, except seamen's wages. But this right of preference or lien may be lost by laches or delay, when the interests of third persons intervene. The right therefore should be followed up with reasonable diligence. Blaine v. The ship Charles Carter, 4 Cranch. Rep. 328. The Jacob, 4 Rob. Adm. Rep. 245.

And when the voyage has not been performed, but the ship has been lost, the right to recover on the bottomry bond is gone forever, though a compensation in the nature of salvage, may have subsequently accrued to the owner. Therefore where the

owner of a ship executed a bottomry bond for 300*l.* on the ship for a voyage to the West-Indies and back, and during the voyage the ship was captured and condemned in a British Court of Vice-Admiralty, and the ship was sold, and afterwards the decree of condemnation was reversed in the high Court of Appeals, and compensation awarded to the owner by the commissioners sitting under the treaty between the United States and G. Britain, and after compensation was received by the owner, an action was brought on the bond, the Supreme Court of Massachusetts held that the plaintiff had no right to recover on the bond, the ship having been lost by the perils enumerated in the condition; and that if any right to recover the amount existed, it must be sought in another form of action. Appleton v. Crowninshield, 3 Mass. Rep. 443.

CHAPTER THE FOURTH.

OF THE BEHAVIOUR OF THE MASTER AND MARINERS.

1. THE great trust reposed in the master by the owners, and the great authority which the law has vested in him, require on his part, and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention. For if any injury or loss happen to the ship or cargo by reason of his negligence or misconduct, he is personally responsible for it; and, although the merchant may elect to sue the owners, *they* will have a remedy against him to make good the damages, which they may be compelled to pay. So, if he make any particular engagement or warranty without a sufficient authority from his owners, although the owners may be answerable to the persons with whom he contracts, by reason of the general power belonging to his situation and character, he is in [161] like manner responsible to the owners for the injury sustained by them in consequence of his acting beyond, or in violation of, the particular authority given to him (*a*) (1).

(*a*) The owners are also answerable for damage done by their ship to another through negligence; and this although the ship be chartered to the Commissioners of the Navy, and a naval officer be on board, and have the command. *Fletcher v. Braddick*, 2 New Rep. C. P. 182.

(1) The law of this section is fully recognized in Purviance, &c. v. Angus, 1 Dall. Rep. 180. The court there said that it is

2. It is impossible to frame any set of general rules competent to enforce the performance of all the civil obligations of a person of this description, and the Legis-

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a wrong position that a master of a ship is not answerable for an *error in judgment*, but only for the fault of the heart in civil matters. Reasonable care, attention, prudence, and fidelity, are expected from the master of a ship, and if any misfortune or mischief ensues from the want of them, either in himself or his mariners, he is responsible in a civil action. And in Talbot v. The owners of three Brigs, 1 Dall. Rep. 95., the responsibility of the owners for the default of the master is fully recognized. And it seems that proceedings may be instituted in the admiralty, to recover damages from the owners for the torts of the master, and by them again in the admiralty to recover their damages from the master. See the same cases ubi supra. So damages may be recovered against the owner in a suit in the admiralty for running down a ship. The Thames, 5 Rob. Adm. Rep. 308., or against the owners of a privateer for injuries done to the ship, or ill treatment of the crew by the captors. Die Fire Damer, 5 Rob. Adm. Rep. 318. See also the St. Juan Baptista, 5 Rob. Adm. Rep. 36., and the cases cited in note, ante p. 100.

The owners of a ship may at their pleasure dismiss the master. Upon a general retainer for no particular voyage, they may dismiss him without cause assigned. But if he be retained for a particular voyage, and has signed bills of lading &c., he may maintain an action for a wrongful dismission, in which damages may be recovered proportionate to the injury. Montgomery v. Henry, &c. 2 Peters. Adm. Rep. 397. 1 Dall. Rep. 49. S. C. And a court of admiralty will dispossess a master though he be a part-owner upon application of the majority of the owners in interest. The New. Draper, 4 Rob. Adm. Rep. 287.

lature of this country has very prudently declined the attempt. With respect however to the mariners, whose duty is much more simple, the Legislature has introduced a few very important rules (*b*), which were at first confined to ships sailing from this country to parts beyond the seas; and afterwards extended to the *British* colonies in *America* (*c*). Similar provisions have been since made with respect to vessels of the burthen of one hundred tons and upwards, employed in the coasting trade, and going to open sea (*d*). (1)

3. By these rules, the contract for service must be made with the master, by a written agreement signed by him and the mariners (*e*). If after entering into such an agreement, a mariner deserts or refuses to proceed on the voyage, he forfeits to the owners all the wages then due to him, and a Justice of [162] the Peace may, on complaint of the master, owner, or person having charge of the ship, issue a warrant to apprehend him, and in case he refuses to proceed on the voyage, and does not assign a sufficient

(*b*) 2 *Geo.* 2. *c.* 36.
(*c*) 2 *Geo.* 3. *c.* 31.
(*d*) 31 *Geo.* 3. *c.* 39.
(*e*) 2 *Geo.* 2. *c.* 36. *s.* 1. & 2. and 31 *Geo.* 3. *c.* 39. *s.* 1. & 2.

(1) The congress of the United States have also passed some statutes for the regulation of seamen employed in the merchant service, and in the coasting trade and fisheries. These regulations apply to ships bound to a foreign port, and to ships of fifty tons and upwards employed in the coasting trade, from a port of one state to a port in any other than an adjoining state; and to ships of twenty tons and upwards employed in the fisheries. Act, 20. July, 1790. 1 U. S. L. 134. Act, 16. February, 1792. 2 U. S. L. 15.

reason for his refusal, may commit him to hard labour in the house of correction, for not more than *thirty*, nor less than *fourteen* days (*f*). If he absents himself from the ship without the leave of the master, or other chief officer having the charge of the ship, he forfeits *two* days pay for every such day's absence, to the use of Greenwich Hospital (*g*). And in the case of foreign voyages, if upon the ship's arrival at her port of delivery here, he leaves it without a written discharge from the master or other person having the charge of the ship, or if in the coasting trade he quits the ship before the voyage is completed and the cargo delivered, or before the expiration of the term for which he engaged, or before he has such a discharge in writing, he forfeits one month's pay to the same use (*h*). But these provisions do not extend to debar any seaman from entering to serve his Majesty on board any of his ships (*i*). (1)

(*f*) 2 *Geo.* 2. *c.* 36. *s.* 3 & 4, and 31 *Geo.* 3. *c.* 39. *s.* 3.
(*g*) 2. *Geo.* 2. *c.* 36. *s.* 5. *and* 31 *Geo.* 3. *c.* 39. *s.* 4.
(*h*) 2 *Geo.* 2. *c.* 36. *s.* 6. and 31 *Geo.* 3. *c.* 39. *s.* 4.
(*i*) 2 *Geo.* 2. *c.* 36. *s.* 13. and 31 *Geo.* 3. *c.* 39. *s.* 4.

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(1) The Act of U. S. 20. July, 1790 (1 U. S. L. 134. chap. 29.) requires that in voyages to a foreign port from the U. S., and in coasting voyages to any other than an adjoining state, the contract for service must be made in writing or in print by the master with the mariners, sect 1.: if, after entering into such an agreement, a mariner does not render himself on board, or deserts so that the ship proceeds to sea without him, he forfeits a sum equal to the advance wages paid him over and beside such advance wages, sect. 2.: a justice of peace may, upon complaint of the master, issue a warrant to apprehend a deserting mariner, and may commit him to the house of correction or common gaol, there to remain until the ship is ready to sail

4. By the common law, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful [163] matters relating to the navigation of the ship, and the preservation of good order: and such obedience they expressly promise to yield to him by the agreement

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on her voyage, and then to cause him to be delivered to the master, sect. 7. If a mariner absents himself, without leave, after the time agreed on for him to render himself on board at the commencement of the voyage, he forfeits one days pay for every hour of absence, sect. 2: if, during the voyage, he absents himself without leave for less than *forty-eight hours*, he forfeits three days pay for every day's absence; but if the absence exceed forty-eight hours at one time, he forfeits all his wages, and all his goods and chattels on board the ship, or in any store where they may have been lodged at the time of the desertion, and be moreover liable to pay the owner's damages occasioned by the hiring another mariner, sect. 5. Fishermen engaged in the fisheries are liable to like penalties for desertion, and may in like manner be apprehended by warrant from a justice of the peace, as mariners in the merchant service. Act, 16. Feb. 1792, ch. 6. sect. 4. And the fishing contract must be in writing, signed by the skipper and the fisherman, and countersigned by the owner. id. sect. 4. The penalty for not complying with the act, in this particular, is a forfeiture of the bounty granted by the act. ib. sect 4.

On the other hand, if a ship bound on a foreign voyage, after the voyage is begun, and before leaving the land, is found to be leaky or unfit in her crew or equipments to proceed on the voyage, the mate or chief officer, and a majority of the crew may require the ship to stop at the first convenient port, and have the ship surveyed, and if necessary fully equipped and fully repaired, under the direction of the District Judge or a justice of

usually made for their service (*k*). In case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner; his authority in this respect being analogous to that of a parent over his child, or of a master over his apprentice or scholar (*l*). Such an authority is absolutely necessary to the safety of the ship, and of the lives of the persons on board. But it behoves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression. The framers of the ancient marine ordinances appear studiously to have avoided the mention of this power. The *French* ordinance (*m*) specifies certain particular modes of punishment, which the master may inflict on "drunken and disobedient "mariners, and those who ill-treat their comrades, or "commit other like faults in the course of their voyage,"

(*k*) See *Appendix*, No. V.

(*l*) Magister nullam habet jurisdictionem ingentem suarum navium, sed quandam tantum œconomicam potestatem vel disciplinam, quæ usque ad levem castigationem, pro corrigenda insolentia et male morata vita seu licentia nautarum et vectorum; quemadmodum eam tenet pater in filios, magister in discipulos, dominus in servos vel familiares. *Casaregis*, Disc. 136. n. 14. *cited by Valin*, on the *French Ordinance*, tom. 1. p. 449. See also Ordin. of Phil. 2. A. D. 1563. 2 Mag. 19. *Molloy*, book 2. ch. 3. sect. 12. and the case of *Watson v. Christie*, 2 Bos. and Pull. 224.

(*m*) Liv. 2. tit. 1. *Du Capitaine*, art. 22.

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the peace. Act, 20. July 1790, ch. 29. sect. 3. And every ship of one hundred and fifty tons and upwards, navigated by ten or more persons, and bound on a foreign voyage, is required to be provided with a medicine chest for the use of the crew, under the penalty of the master's paying for all advice, medicine, and attendance of physicians, which any of the crew may stand in need of, in case of sickness. id. sect. 8. And ships bound on a voyage across the Atlantic Ocean shall, at the last port from whence they sail, have on board, under deck, at least sixty gallons of water, one hundred pounds of salted flesh-meat,

but it requires the consent of the steersman and mate; by the law of *England* such consent is [164] not required; nevertheless the master should except in cases requiring his immediate interposition, take the advice of the persons next below him in authority, as well to prevent the operation of passion in his own breast, as to secure witnesses to the propriety of his conduct. For the master, on his return to this country may be called upon by action at law, to answer to a mariner, who has been beaten or imprisoned by him, or by his order, in the course of a voyage; and for the justification of his conduct, he should be able to shew not only that there was a sufficient cause for chas-

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and one hundred pounds of wholesome ship bread, for every person on board the ship, over and besides such other provisions, stores and live stock, as shall by the master or passengers be put on board, and in like proportion for shorter or longer voyages And in case the same shall not be provided, the master is liable to pay to each of the crew, one days wages beyond the wages agreed on, for every day they shall be put on short allowance, to be recovered in the same manner as their stipulated wages. id. sect. 9. Where in the course of the voyage these articles cannot be obtained, their equivalents in quantity and quality should be obtained, and in such cases the rations allowed in the navy of the U. S. (Act, 1. July, 1797, sect. 7.) seems a proper rule. —— v. Ship Washington, 1 Peters. Adm. Rep. 219. And the compensation for short allowance will be made to mariners, who in the course of the voyage, *ship at a foreign port.* Gardner, &c. v. Ship New Jersey, 1 Peters. Adm. Rep. 223.

A recent act, 2. March, 1805, ch, 38. (7 U. S. L. 301.) enacts that a medicine chest shall be provided for every ship of *seventy five tons*, navigated by six persons in the whole, and bound from the United States to the West-Indies.

tisement, but also that the chastisement itself was reasonable and moderate, otherwise the mariner may recover damages proportionate to the injury received (*n*). And if the master strike a mariner without cause, or use a deadly weapon as an instrument of correction, where moderate correction may be inflicted, and death ensue, he will be guilty either of manslaughter or murder (*o*), according to the rules and distinctions of the criminal law of *England* in analogous cases, all of which are applicable to persons in this situation ; and by the [165] late extension of the jurisdiction of the commissioners appointed for the trial of offences committed at sea, all offences committed there may now be tried before them, and punished as if committed on shore (*p*). In the case of actual and open mutiny by the crew or any part of them, the resistance of the master becomes an act of self-defence, and is to be considered in all its consequences from that point of view. The ordinances of *Oleron* (*q*) and *Wisbuy* (*r*), declare that a mariner who strikes the master, shall either pay a fine, or lose his right hand ; a strange as well as cruel alternative, unknown in the modern jurisprudence of this country (1).

(*n*) To an action of this sort, the master must plead specially that the plaintiff committed such a particular fault, and that he corrected him moderately for it. The plaintiff by his replication may either deny the cause of correction, or, admitting the cause, may insist that the correction was excessive. If the master does not plead his justification specially, he will not be entitled to give in evidence under the general issue, for the purpose of mitigating damages, facts, which, if pleaded, would amount to a justification. *Watson v. Christie*, 2 Bos. and Pull. 224.

(*o*) *Captain Kidd's Case*, 5 State Trials, 287.

(*p*) 39 *Geo.* 3. *c.* 37.

(*q*) *Art.* 12.

(*r*) *Art.* 24.

(1) The authority and duties of the master in the particulars stated in this section, are fully recognized in many cases in the

5. But although the master may by force restrain the commission of great crimes, he has no judicial authority to punish the criminal, but ought to secure his person and cause him to be brought before a proper tribunal of his country (*s*). By a late statute, all Justices of the Peace are empowered to receive informations touching any murder, piracy, felony, or robbery upon the sea, and to commit the offenders for trial (*t*). (2)

(*s*) *Hanseatic* Ordin. art. 30. *Du Capitaine, art.* 23. *Roccus*, Not. 8 *French* Ordinance, book 2. tit. 1. (*t*) 43 *Geo.* 3. *c.* 160. *sect.* 78.

District Courts of the U. S. See Relf, &c. v. The Maria, 1 Peters. Adm. Rep. 186. Thorne v. White, 1 Peters. Adm. Rep. 168. Black v. Ship Louisiania, 2 Peters. Adm. Rep. 268. And the master may, in cases of disobedience, correct the offending mariner, by imprisonment on board of the ship for a reasonable time, id. ibid.; and even by imprisonment in a guard ship or common gaol in a foreign port, if such punishment be according to the custom of the port, or be required by circumstances. id. ibid. in the notes. Wuilson v. Fairfield, Essex S. J. C. Nov. T. 1807, Lemart v. Strout, same term. Orne v. Williams, Essex S. J. C. Nov. T. 1808. cor. Sewall J. at the sittings. MSS. On the other hand the law enjoins on the master a temperate demeanor, and decent conduct toward seamen. By many of the sea laws, he is finable for abusive expressions, or misconduct towards mariners. He risks the consequences, if he commence a dispute with illegal conduct and improper behaviour. The laws, though often applied to for this purpose, do not encourage or gratify revenge; they only punish for reformation or example, 1 Peters. Adm. Rep. 175.

(2) The congress of the U. S. have provided by statute for the punishment of many crimes committed on the high seas, which will hereafter be noticed. But it has been questioned, whether the courts of the U. S. have any jurisdiction for the

6. In general also the master may for misbehaviour discharge a mariner from his service in the [166] ship (2); but in the *African slave trade*, the master of a *British* ship is forbidden to do this on

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punishment of crimes committed on the high seas, unless the same be specially provided for by statute. In the Circuit Court of the U. S., the court were divided in opinion on the point of jurisdiction, on a case of an assault and battery committed at sea, Judge Peters affirming and Judge Chase denying it. But in a late case (1806) where one Magill (a mate) was indicted for murder, in killing his captain in the haven of Cape Francois, and it appeared in evidence that the blow was given on board the ship, but the death ensued on shore; the court consisting of Judges Washington and Peters, ruled that the defendant ought to be acquitted, for that the whole offence, both the *stroke* and the *death*, must occur on the high seas to warrant the jurisdiction of the court; but they ordered the defendant to be bound *over to answer at the next court to a charge of assault and battery*, and Judge Washington, on that occasion said, "There "are undoubtedly in my opinion many crimes and offences a- "gainst the authority of the U. S., which have not been special- "ly defined by law; for I have often decided that the federal "courts have a common law jurisdiction in criminal cases." U. S. v. Magill, 4 Dall. Rep. 426. S. C. 1 Peters. Adm. Rep. 168. note.

By the act of the U. S. 24. Sep. 1789 ch. 20. sect. 33. (1 U. S. L. 72.) any Justice or Judge of the United States, or any justice of the peace, or other magistrate of any of the U. S., where any offender is found, may arrest and commit him for trial, for any offence committed against the United States.

(2) The right of a master to discharge a mariner for misbehaviour, seems fully recognized in several decisions in the District Courts of the U. S. But the misbehaviour must however

any pretence whatsoever, unless he turns him over unto one of his Majesty's ships of war, or to assist a ship in

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be of an aggravated nature, for slight and venial offences will not authorize a discharge. If a mariner be incorrigibly disobedient and mutinous, and persist in such ill conduct ; if he be guilty of crimes or gross dishonesty ; if he become incapacitated to perform his duty from his own improper conduct, he may be discharged. But if a mariner be disobedient and mutinous, and repent and offer to make satisfaction and to return to his duty, the master is bound to receive him. If the master will not in such case receive and reinstate him, but discharges him, the maritime laws declare that he may follow the ship and recover his wages for the whole voyage. See Laws of Oleron, art. xiii. and Thorne v. White, 1 Peters. Adm. Rep. 168. Relf & others v. Ship Maria, id. 186. Atkins v. Burrows, id. 244. Black v. Ship Louisiana, 2 Peters. Adm. Rep. 268. And if a master wrongfully discharge a mariner, he is liable to answer in damages therefor. Atkins v. Burrows above cited. Hulle v. Heightman, 2 East. Rep. 145. The same law applies as well to the mate and subordinate officers as to the mariners.

When a ship is sold in a foreign country and the crew discharged, and when a mariner, a citizen of the U. S., *is with his own consent discharged* in a foreign country, the master must pay into the hands of the American Consul or agent at the port of discharge, for every mariner so discharged, three months' pay over and besides his wages, two thirds thereof to be paid by the consul or agent to the mariner discharged, upon his engagement, on board any ship to return to the U. S. and the other third to be retained for the purpose of creating a fund for the passages of mariners, citizens of the U. S., desirous of returning thereto, and for the maintenance of American mariners, who are destitute at such foreign port. Act, 28. February, 1803, ch. 62. 6 U. S. L. 206.

actual distress (*u*). And in this trade, "*if any officer, "mariner, or seaman, shall behave in a riotous, seditious, "or mutinous manner,*" the master may put him into confinement, but must within twenty-four hours report to the commander of any of his Majesty's ships present, or within a convenient distance, who is authorized to enquire and examine upon oath into the cause of complaint, and grant such remedy as the case may require: if no such ship is present, the cause of complaint may be examined into by the master and two officers, in the presence of the ship's company; and if it shall be judged necessary for the safety of the ship and cargo, to continue the offender in confinement, such determination shall be drawn up in writing, and the reasons of the resolutions stated at large, and signed by the master and two officers, which they are to report without delay to the commander of the first of his Majesty's ships they may fall in with, and, in default thereof, to the governor or chief officer of any *British* fort in *Africa*, or the governor of any of the *West-India* islands, on arrival at any port or road therein, that proper measures may be taken to bring the offender to justice (*x*).

[167] 7. The term *barratry*, which is often used as well by foreign writers, as those of our own nation, is generally understood in this and in most other countries to denote a *fraudulent* act of the master or mariners committed to the prejudice of the owners of the ship (*y*) (1). In *France* it is often used in a more

(*u*) 39 *Geo.* 3. *c.* 80. *s.* 29.
(*x*) Id. *s.* 31.
(*y*) *Emerigon*, tom. 1. p. 366.

(1) Barratry is a fraudulent breach of duty by the master in respect to his owners, or, in other words, it is a breach of duty

enlarged sense, and comprehends acts of mere ignorance or unskilfulness, not accompanied with a fraudulent design (*z*). This word taken even in the more limited sense, in which it is used in this country, does not denominate any species of crime punishable by law; but several offences committed by the master and mariners in violation of their trust and duty, and which fall within the definition of barratry, are punishable by different statutes, which I shall now proceed to mention.

8. First, as to the offence of wilfully destroying the ship. This is now punishable with death. By the first statute passed on this subject, in which it is recited that "it often happens that masters and mariners of

(*z*) *Valin*, on the *French* Ordinance, tom. 2. p. 80. *Pothier*, des assurances, num. 65.

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in respect to his owners, with a criminal intent or ex maleficio. And it makes no difference in the reason of the thing whether the prejudice suffered by the owner be owing to an act of the master induced by motives of advantage to himself, malice to the owner, or a disregard to those laws, which it was the master's duty to obey, and which (or it would not be barratry) his owners relied upon his observing. Therefore where a ship was lost in consequence of an illegal act of the master, not authorized by the owner, in going to an enemy's port and there carrying on trade, it was held that the conduct of the master was barratry. Earle v. Rowcroft, 9 East. Rep. 126. So if the master sail out of port without paying port duties, whereby the goods are forfeited, lost, or spoiled, that is barratry. Knight v. Cambridge, 1 Str. 581. 2 Ld. Ray. 1349. 8 Mod. 236. though this point appears to have been decided, in this case only, by the references of later cases. Stamma v. Brown, 2 Str. 1174., & MS. note cited 9 East, 135., & Vallejo v. Wheeler, Cowp. 153. So sailing out of port in breach of an embargo. Per

" ships having insured or taken upon bottomry greater " sums of money than the value of their adventure, do " wilfully cast away, burn, or otherwise destroy the " ships under their charge, to the merchants [168] " and owner's great loss." It is enacted, " that " if any captain, master, mariner, or other offi- " cer belonging to any ship, shall wilfully cast away, " burn, or otherwise destroy the ship, unto which he

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Buller J. in Robinson v. Ewer, 1 T. Rep. 127. So cruizing under letters of marque, which were taken on board without an intention for being used for this purpose. Moss v. Byrom, 6 Term. Rep. 379. So resistance of right of search by the master of a neutral ship, per Buller. Saloucci v. Johnson, cited Park on Ins. ch. 18. and Garrels v. Kensington, 8 Term. Rep. 230. So smuggling, Havelock v. Hancill. 3 Term Rep. 277. Criminal intent or fraud in the master, is the very essence of barratry, and mere negligence does not amount to it. Therefore a deviation through mere ignorance is not barratry. Phyn v. Royal Exch. Assur. Company, 7 T. Rep. 505. See also M'Intire v. Bowne 1 John. Rep. 229, cited ante p. 25. note.

But where a master sailed with his ship from a port in pursuit of another ship, which had been run away with, and was to receive 100*l.* for his pursuit, and after eight days he returned, and afterwards the ship was lost; it appearing that the master did not undertake this expedition merely for his own benefit, the court were of opinion that his conduct amounted to a mere deviation, and not to barratry. Hood's Exrs. v. Nesbit, 2 Dall. Rep. 137. See also Thurston v. The Columbian Insurance Company, 3 Cain. Rep. 89.

Where a fraudulent act is done by the master, the law presumes that it is done for his own benefit, and the onus to the contrary lies on the other party. Hendrick v. Delafield, 2 Cain. Rep. 67.

" belongeth, or procure the same to be done, he shall " suffer death as a felon (*a*)."

By the *second*, it is enacted " that if any captain, " master, or mariner, or other officer belonging to any ship, " shall wilfully cast away, burn, or otherwise destroy the " ship, unto which he belongeth, or procure the same to " be done, to the prejudice of the owner or owners thereof, " or of any merchant or merchants, that shall load goods " thereon, he shall suffer death as a felon (*b*)."

Further provisions were made in the reign of *George the first* (*c*), but these, soon after the determination of an important prosecution at the *Old Bailey* (*d*), and I presume in order to remedy a defect in the law manifested on that occasion, were repealed by the Legislature (*e*), except as to prosecutions for offences committed before the 16th of *July* 1803 (*f*). And it was then enacted, " That if any person or persons shall, from " and after the *sixteenth* day of *July* 1803, wilfully cast " away, burn, or otherwise destroy, any ship or vessel, " or in anywise counsel, direct, or procure the " same to be done, and the same be accordingly [169] " done, with intent or design thereby wilfully " and maliciously to prejudice any owner or owners of " such ship or vessel, or any owner or owners of any " goods loaden on board the same, or any person or " persons, body politic or corporate, that hath or have " underwritten or shall underwrite any policy or policies " of insurance upon such ship or vessel, or on the " freight thereof, or upon any goods loaden on board " the same, the person or persons offending therein be-

(*a*) 22 & 23 *Car.* 2. *c.* 11. *s.* 12.
(*b*) 1 *Ann*, st. 2. *c.* 9. *s.* 4.
(*c*) 4 *Geo.* 1. *c.* 12. *sect.* 3. 11 *Geo.* 1. *c* 29. *sect.* 5, 6, & 7.
(*d*) The case of *Easterby v. Macfarlane*, Addenda to East's P. C. p. xxvi.
(*e*) 43 *Geo.* 3. *c.* 113. See *chap.* 79. of the same year as to *Ireland.*
(*f*) Id. *sect.* 4.

"ing thereof lawfully convicted, shall be deemed and "adjudged a principal felon or felons, and shall suffer "death as in cases of felony without benefit of clergy."

And, "That if any such ship or vessel shall, from "and after the *sixteenth* day of *July* in the year of our "Lord 1803, be wilfully cast away, burnt, or otherwise "destroyed, within the body of any county of this realm, "that then the said several offences, as well in wilfully "casting away, burning, or otherwise destroying such "ship or vessel, as in counselling, directing, or procur-"ing the same to be done as aforesaid, shall and may "be respectively enquired of, tried, or determined, and "adjudged in the same Courts, and in such manner and "form, as felonies done within the body of any country, "by the laws of this realm now are to be, or by virtue "of this Act hereafter may be, inquired of, tried, de-"termined, and adjudged: and if any such ship or ves-

"sel shall be wilfully cast away, burnt, or other-
[170] "wise destroyed on the high seas, then that the

"said several offences, as well in wilfully cast-"ing away, burning, or otherwise destroying any such "ship or vessel, as in counselling, directing, and pro-"curing the same to be done as aforesaid, shall and "may be respectively enquired of, tried, determined, "and adjudged, before such Court, and in such manner "and form as in and by an Act made in the eight and "twentieth year of the reign of King *Henry the Eighth*, "intituled, *For Pirates*, is appointed and directed for "the inquiring, trying, determining, and adjudging of "felonies upon the high seas."

"And whereas it is convenient that accessaries to "felonies committed within the body of any county "within the realm, should be by law liable to be tried,

"as well in the county wherein the principal felony was "committed, as in the county in which they so became "accessaries, and also that accessaries to felonies com- "mitted upon the high seas should be by law liable to "be tried by such Court, and in such manner as by the "Act made in the eight and twentieth year of the reign "of the late King *Henry the Eighth* is directed in re- "spect to felonies done upon the high seas;" it is fur- ther enacted, "That from and after the said *sixteenth* "day of *July* in the said year of our Lord 1803, in all "cases whatsoever in which any person or persons shall "hereafter procure, direct, counsel, or command any oth- "er person or persons to commit, or shall abet any other "person or persons in committing any felony "whatsoever, or shall in anywise whatsoever [171] "become an accessary or accessaries before the "fact to any felony whatsoever, whether such principal "felony be committed within the body of any county "within this realm, or upon the high seas, and whether "such procuring, directing, counselling, commanding, "and abetting, or otherwise becoming accessary or ac- "cessaries before the fact shall have been committed or "done within the body of any county within this realm, "or upon the high seas, that then and in all such cases, "the offence of the person or persons, so procuring, "directing, counselling, commanding, or abetting such "felony, or so in anywise becoming accessary or acces- "saries before the fact to such felony, shall and may be "enquired of, tried, determined, and adjudged, in case "such principal felony shall have been committed "within the body of any county within this realm, by "the course of the common law, either within such "county wherein the said pricipal felony shall have

"been committed, or within the county wherein the "said offence in procuring, counselling, commanding, "and abetting, or otherwise becoming accessary or ac- "cessaries before the fact shall have been committed "or done; and in case the said principal felony shall "have been committed upon the high seas, then the "said offence in procuring, directing, counselling, com- "manding, or abetting such felony, or of so becoming "an accessary or accessaries before the fact to [172] "the same, shall and may be inquired of, in "and by such Court, and in such manner and "form, as in and by the said Act made in the eight "and twentieth year of the reign of King *Henry the* "*Eighth* is appointed and directed for the trying, de- "termining, and adjudging of felonies done upon the "high seas;" with a proviso, that a person who has been tried under one jurisdiction, shall not be again tried in the other (1).

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(1) The Act of the U. S. 26. March, 1804, (7 U. S. L. 126. ch. 40.) sect. 1. provides, "that any person, not being an own- "er, who shall on the high seas wilfully and corruptly cast "away, burn or destroy any ship or other vessel unto which he "belongeth, being the property of any citizen or citizens of the "United States, or procure the same to be done, and being "thereof lawfully convicted, shall suffer death"—And sect. 2. "that if any person shall on the high seas wilfully and cor- "ruptly cast away, burn, or otherwise destroy, any ship or ves- "sel of which he is the owner in part or in whole, or in any "wise direct or procure the same to be done, with intent or "design to prejudice any person or persons, that hath under- "written or shall underwrite any policy or policies of insurance "thereon, or *of* any merchant or merchants that shall load goods

9. SECONDLY, as to the offences of running away with the ship or cargo, and of making a revolt in the ship. These also are now punishable with death.

For by a statute passed in the reign of King *William the Third* (*g*), it is enacted, "that if any commander or "master of any ship, or any seaman or mariner, shall "in any place, where the admiral hath jurisdiction, be- "tray his trust and turn pirate, enemy, or rebel, and "piratically and feloniously run away with his or their "ship or ships, or any barge, boat, ordnance, ammuni- "tion, goods, or merchandizes; or yield them up vol- "untarily to any pirate, or shall bring any seducing "messages from any pirate, enemy, or rebel; or consult, "combine, confederate with, or attempt or endeav- "our to corrupt any commander, master, officer, or "mariner, to yield up or run away with any ship, "goods, or merchandizes, or turn pirate, or "go over to pirates, or if any person shall lay [173] "violent hands on his commander, whereby to

(*g*) 11 & 12 *Wm.* 3. *c.* 7. *s.* 9. made perpetual by 6 *Geo.* 1. *c.* 19.

"thereon, or of any other owner or owners of such ship or ves- "sel, the person or persons offending therein being thereof "lawfully convicted, shall be deemed and adjudged guilty of "felony, and shall suffer death."

In the construction of this act, it has been held in the Circuit Court of the U.S., "that to *destroy* a vessel is to unfit her for "service, beyond the hopes of recovery by ordinary means. "This in extent of injury is synonymous with *cast away*. It is "the generical term; *casting away* is a species of *destroying*, as "*burning* is. Both mean such an act, as causes a vessel to per- "ish or be lost, so as to be irrecoverable by ordinary means." U. S. v. Richard Johns, 4 Dall. Rep. 412.

" hinder him from fighting in defence of his ship and " goods committed to his trust, or that shall confine his " master, or make or endeavour to make a revolt in the " ship, shall be adjudged, deemed, and taken to be a " *pirate, felon*, and *robber*, and being convicted thereof " according to the directions of this Act, shall have and " suffer pains of *death*, loss of lands, goods, and chat- " tels, as *pirates, felons*, and *robbers* upon the seas, ought " to have and suffer (*h*)." (1)

(*h*) These are deprived of the *benefit of clergy* by 28 *Hen.* 8. *c.* 15. *s.* 3.

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(1) The Act of the U. S. 30. April, 1790, (1 U. S. L. 100.) ch.9.sect.3.provides, "that if any person or persons shall commit " upon the high seas,or in any river,haven,bason or bay,out of the " jurisdiction of any particular state, murder or robbery, or any " other offence, which, if committed within the body of a coun- " ty, would by the laws of the United States, be punishable " with death; or, if any captain or mariner of any ship or other " vessel, shall piratically or feloniously run away with such ship " or vessel, or any goods or merchandize to the value of fifty " dollars, or yield up such ship or vessel voluntarily to any " pirate; or if any seaman shall lay violent hands upon his " commander, thereby to hinder and prevent his fighting in " defence of his ship, or goods committed to his trust, or shall " make a revolt in the ship; every such offender shall be deem- " ed, taken, and adjudged to be a pirate and a felon, and being " thereof convicted, shall suffer death." And sect. 12. provides, " that if any seaman or other person shall commit manslaughter " upon the high seas, or confederate, or attempt, or endeavour " to corrupt any commander, master, officer or mariner, to yield " up or to run away with any ship or vessel, or with any goods, " wares, or merchandize, or to turn pirate, or to go over to, or " confederate with pirates; or in anywise trade with any pi-

10. THIRDLY, as to the offence of not resisting pirates and enemies (*i*). It appears formerly to have been a practice with the *Turkish pirates* to restore a ship, and the goods of the master, and mariners, and sometimes even to pay the whole, or a part, of the freight, if the ship yielded to them, and they were suffered to take out the cargo without resistance. To prevent this practice, a statute was passed so long ago as the reign of *King Charles the Second*, in the preamble whereof this practice is recited, and by which the master of any vessel of a burthen not less than two hundred tons, and furnished with sixteen guns, is forbidden to yield his cargo to pirates of any force, without resistance, on pain of being rendered incapable to take charge of any *English* vessel afterwards. And if the ship is released, and any thing given by the pirates to the master, such gift and his share of the ship are to go to the owners of the

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(*i*) See *Hanseatic* Ordinance, art. 35, 36, 37, & *Roccus*, Not. 70.

"rate, knowing him to be such; or shall furnish such pirate "with any ammunition, stores, or provisions of any kind, or "shall fit out any vessel knowingly and with a design to trade "with, or supply, or correspond with any pirate, or robber "upon the high seas; or if any person or persons shall any "ways consult, combine, confederate, or correspond with any "pirate or robber on the seas, knowing him to be guilty of "any such piracy or robbery; or if any seaman shall confine "the master of any ship or other vessel, or endeavour to make "a revolt in such ship; such person or persons so offending "and being thereof convicted shall be imprisoned, not exceeding three years, and fined not exceeding one thousand dollars.

goods. And any ship of less burthen or force than before mentioned is forbidden to yield to a *Turkish* pirate, not having double her number of guns, without fighting (*k*). An extraordinary instance of the courage and skill, which the Legislature of those times attributed to *English* seamen, and which the exploits of succeeding generations have so often and so gloriously exemplified!

By the same statute it is enacted, "that if the mariners or inferior officers of any *English* ship, laden "with goods and merchandizes as aforesaid, shall decline or refuse to fight and defend the ship, when "they shall be thereunto commanded by the master or "commander thereof, or shall utter any words to discourage the other mariners from defending the ship, "that every mariner who shall be found guilty of declining or refusing as aforesaid, shall *lose all his wages* "due to him, together with such goods as he hath in "his ship, and suffer imprisonment, not exceeding the "space of *six* months, and shall during such time be "kept to hard labour for his or their maintenance (*l*)."

[175] And the before-mentioned statute of *William the Third*, has made the offence of voluntarily yielding up to pirates a capital crime (*m*).

12. The Legislature however has not been less studious to reward and provide for deserving mariners, than to punish the fraudulent or the fearful.

To this purpose it has been enacted (*n*), "that when

(*k*) 16 *Car.* 2. *c.* 6. 22 & 23 *Car.* 2. *c.* 11.
(*l*) 22 & 23 *Car.* 2. *c.* 11. *s.* 7.
(*m*) 11 & 12 *Wm.* 3. *c.* 7. *s.* 9.
(*n*) 11 & 12 *Wm.* 3. *c.* 7. *s.* 11. See also 22 & 23 *Car.* 2. *c.* 11. *s.* 10. By the *Hanseatic* Ordinance, art. 35, a seaman disabled in defending a ship against rovers is to be maintained during his life, at the common charge of the concerned in a general average. And the *Hanseatic* Ordinance of the year 1614, is to the same effect. Tit. 14. art. 3.

"any *English* ship shall have been defended against "any pirates, enemies, or sea-rovers by fight, and "brought to her designed port, in which fight any of "the officers or seamen shall have been killed or wound-"ed, it shall and may be lawful to and for the Judge "of his Majesty's High Court of Admiralty, or his "Surrogate in the port of *London*, or the Mayor, Bail-"iff, or Chief Officer in the several out-ports of this "kingdom, upon the petition of the master or seamen "of such ship, so defended as aforesaid, to call unto "him four or more good and substantial merchants, "and such as are no adventurers or owners of the ship "or goods so defended, and have no manner of interest "therein, and by advice with them to raise and levy "upon the respective adventurers and owners of the "ship and goods so defended, by process out of the "said Court, such sum or sums of money, as "himself and the said merchants by plurality [176] "of voices shall determine and judge reasona-"ble, not exceeding *two pounds per centum* of the freight, "and of the ship and goods so defended, according to "the first cost of the goods; which sum or sums of "money, so raised, shall be distributed among the "captain, master, officers and seamen of the said ship, "or widows and children of the slain, according to the "direction of the Judge of the said Court, or his Sur-"rogate in the port of *London*, or the Mayor, Bailiff, "or Chief Officer in the several out-ports of this king-"dom, with the approbation of the merchants aforesaid, "who shall proportion the same according to their best "judgment unto the ship's company as aforesaid, having "special regard unto the widows and children of such "as shall have been slain in that service, and such as "have been wounded or maimed."

13. By two subsequent statutes seamen in the merchant service disabled in fight against a *pirate* (*o*), or *enemy* (*p*), were to be admitted into and provided for in *Greenwich Hospital*, the great asylum for decayed and disabled seamen belonging to the royal navy: but that hospital being found insufficient for this addition to the primary objects of its institution, another national establishment was erected in the last reign (*q*), "*for the "relief and support of maimed and disabled sea-*
[177] "*men, and the widows and children of such as "shall be killed, slain, or drowned, in the mer-*"*chant service.*" To provide a fund for this charitable institution every person serving in any merchant ship, or other private ship or vessel, belonging to any of his Majesty's subjects in *England*, (except apprentices under the age of eighteen, persons employed in boats upon the coast in taking fish, which are brought fresh on shore, or in boats within rivers, or open boats on the coast, and pilots, and except persons employed in the service of the *East-India Company*, and who are not entitled to the benefit of this institution, being provided for by a fund established by the Company) pays *sixpence per month*, which is to be deducted out of his wages by the master, and by him paid over to the persons appointed under the authority of the Act, at the port to which the ship belongs, before she shall be allowed to clear inwards (*r*). For the management and distribution of this fund, a corporation is created, composed chiefly of eminent merchants, with power to purchase land and erect an hospital, and to provide for seamen rendered incapable of service by sickness, wounds, or other ac-

(*o*) 8 *Geo.* 1. *c.* 24.
(*p*) 8 *Geo.* 2. *c.* 29. *sect.* 10.
(*q*) 20 *Geo.* 2. *c.* 38.
(*r*) 20 *Geo.* 2. *c.* 38. *s.* 17, 18 & 23.

cidental misfortunes, and decrepit and worn out by age, either by receiving them into the hospital, or by pensions, and also to relieve the widows and children of seamen killed or drowned in the service, provided the children are not of the age of fourteen years; or, if of that age and upwards, are incapable [178] of getting a livelihood by reason of lameness, blindness, or other infirmity, and are proper objects of charity; and to make reasonable allowances to those, who shall lose an eye or limb, or be otherwise hurt or maimed in fighting, defending, or working their ships, or doing any other duty in their service, in proportion to their hurt, so far forth as the income and revenues of the charity will extend for these purposes (*s*). But no person is to be provided for as a worn-out seaman, who has not been employed in the merchant service *five* years, and paid the contribution (*t*). And in providing for this class, a preference is to be given to such as have served longest and contributed most (*u*).

And in order to ascertain the times of service and payment of the contribution, the master must keep a muster-roll of the persons employed in the ship, and before its departure deliver a duplicate to the collector of these duties at the port; and during the voyage enter the time and place of discharge, quitting, and desertion, and of receiving other persons on board, and of any hurt, damage, death, or drowning; of which he must also deliver a duplicate at his return under the penalty of 20*l*. (*x*): to the truth whereof he may be examined upon oath by the collector (*y*). And in case any person

(*s*) 20 *Geo.* 2. *c.* 38. *s.* 1 & 2.
(*t*) Id. sect. 3.
(*u*) Id. sect. 32.
(*x*) Id. sect. 20.
(*y*) Id. sect. 21.

employed on board any ship or vessel shall, in [179] doing his duty on shore or on board, break an arm or leg, or be otherwise hurt or maimed, he is to be properly relieved until sufficiently recovered to be sent to the place to which the ship belongs (*z*).

These are the principal objects of this excellent institution: several provisions for carrying them into effect are contained in the statute, of which the detail would be improper for this place (1).

(*z*) 20 *Geo.* 3. *c.* 38. *s.* 33.

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(1) The United States have not been insensible of the sound policy of relieving and protecting their mariners. By several acts they have provided for the relief of their indigent and distressed mariners *in foreign countries*, in cases of captivity, shipwreck, sickness, and impressments, by directing them to the care of their consuls and public agents, who are authorized and required to afford them suitable aid. The various provisions on this will be found in the following acts. Act, 14. April, 1792, ch. 24. (2 U. S. L. 56.) Act, 28. March, 1796, ch. 36. 3 U. S. L. 322. Act, 28. Feb. 1803, ch. 62. 6 U. S. L. 206. Act, 19. February, 1799. ch. 112. 4 U. S. L. 253. Act, 2. March, 1799. ch. 147. 4 U. S. L. 502. See Appendix.

So by several acts, provision is made *at home* for erecting hospitals, and for the temporary maintenance and relief of sick and disabled seamen, employed as well in the navy, as in the merchant service, and coasting trade of the United States; and twenty cents per month, are deducted from the wages of every seaman, employed as aforesaid, to provide a suitable fund for this purpose. This fund is under the direction and management of the President of the United States, and of directors appointed by him. Act, 16. July, 1798, ch. 94. 4 U. S. L. 223. Act, 2. March, 1799. ch. 142. 4 U. S. L. 497. Act, 3. May, 1802. ch. 51. 6 U. S. L. 174. and Appendix.

14. By the ancient marine ordinances, if a mariner falls sick during a voyage, or is hurt in the performance of his duty, he is to be cured at the expence of the ship, but not if he receives an injury in the pursuit of his own private concerns (*a*) (1).

(*a*) Laws of *Oleron*, art. 6, of the laws of *Oleron ubi supra.* See *Wisbuy*, art. 18, of the *Hanse post*, part 4, ch. 2. s. 2. *Towns*, art. 39, *&c.* See *Cleirac* on

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(1) Nor is he to be cured at the expence of the ship, if the sickness or disability is owing to vicious or unjustifiable conduct. Laws of Oleron, art. 6. In one case, Judge Peters seems to have considered, that the cure is to be at the expence of the ship when a seaman is disabled on actual duty, but not when he is taken sick or (owing to no misconduct) accidentally disabled while in service. Walton, &c. v. Ship Neptune, 1 Peters. Adm. Rep. 151. But this doctrine may seem to be qualified by a note to the text in the same case, and also by a note to Hastings, &c. v. Ship Happy Return, 1 Peters. Adm. Rep. 255; and as to the case of sickness, the doctrine is contrary to the laws of Oleron, art. 7.

The act of Congress, (29. July, 1790, ch. 29. sect. 8.) provides that if a medicine chest is not provided and kept fit for use in the cases required by the act, the master of the ship shall provide and pay for all such advice, medicine, and attendance of physicians, as any of the crew shall stand in need of, in case of sickness, without any deduction from their wages. Judge Peters seems very reluctantly to have held that if the medicine chest is so provided, the seaman must pay for chirurgical and medical advice and attendance, and says, "I have not been "perfectly satisfied that the seamen should pay the bill for "medical advice, which, to complete the intent of the provi-"sion, should be a charge on the ship; but finding the weight "of authority that way, I have yielded." But the same Judge

15. If by shipwreck, capture, or other unavoidable accident, any seafaring men or boys, subjects of *Great Britain*, are cast away in foreign parts, the governors, minister, and consuls appointed by his Majesty, or where none such are resident, two or more *British* merchants there residing, are required to provide for and subsist them, at the rate of *sixpence per day*, for which they are to send bills with proper vouchers to the commissioners of the navy, and to put them on board the first ship belonging to his Majesty that arrives there, or within a convenient distance, and in case no [180] such ship shall be found, to send them on board such merchant ships bound for *Great Britain* as shall be in want of men: and if neither case happens within a convenient time, to provide them a passage homeward in the first merchant ship bound for *Great Britain*, of which the master is bound to receive, not exceeding *four* persons for every one hundred tons of his ship's burthen; and he is to be paid *sixpence per day* by the commissioners of the navy for such of them, as he did not want towards his own complement of men (*b*) (1).

(*b*) 1 *Geo.* 2. *st.* 2. *c.* 14. *s.* 12.

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seems to have held *generally*, that the medicine and nursing of the sick seaman, and even his board on shore, where circumstances required it, were charges on the ship. See the cases and notes cited above, and in conformity thereto, the laws of Oleron, art. 7.

(1) The Act of the U. S. 28. February, 1803, ch. 62. 6 U. S. L. 206. sect. 4. enacts, that the consuls or other agents of the U. S. at foreign ports, shall provide subsistence and passages

16. If a master of a merchant ship being abroad shall force any man on shore, or wilfully leave him behind in any of his Majesty's plantations, or elsewhere, or refuse to bring home again all such of the men he carried out with him, as are in a condition to return, when he shall be ready to proceed in his homeward-bound voyage, every such master shall, being thereof legally convicted, suffer *three* months imprisonment (*c*) (2).

(*c*) 11 & 12 *Wm.* 3. *c.* 7. *s.* 18.

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to the U. S. for destitute American seamen in a reasonable manner, at the expence of the United States; and masters of ships are thereby required, under the penalty of one hundred dollars, to take on board at the request of such consuls or agents, at a price not exceeding ten dollars for each person, two seamen for every one hundred tons burthen of the ship, and to transport them to the United States; and the seamen, so put on board shall, if able, do duty during the voyage.

(2) See ante 165. sect. 6. and quere if this statute applies to a case of discharge for misbehaviour.

CHAPTER THE FIFTH.

OF PILOTS.

THE name of pilot, or steersman, is applied either to a particular officer, serving on board a ship during the course of a voyage, and having the charge [181] of the helm and of the ship's route; or to a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port. The *French* Ordinance, contains several regulations calculated to obtain the necessary skill and experience in persons of the first description (*d*). In this country there is no particular provision relating to them, and many ships are navigated without an officer of this description, the master taking upon himself the charge of the helm, and the conduct of the vessel.

Pilots of the *second* description are established at several places in this country by ancient charters of incorporation or particular statutes (*e*). And in general the master of a ship engaged in foreign trade must put his ship under the charge of such a pilot, both in his outward and homeward voyage, within the limits of

(*d*) Liv. 2. Tit. 4. *Du Pilote.*

(*e*) Pilotage from *Dover*, *Deal*, and the *Isle of Thanet*, up the rivers *Thames* and *Medway*, is regulated by *statutes*, 3 *Geo.* 1. *c.* 13. 7 *Geo.* 1. *c.* 21. and 43 *Geo.* 3. *c.* 152. revived and continued by 47 *Geo.* 3. st. 2. *c.* 71. P. 1. & p. Pilotage *down* the *Thames*, and through the *North-Channel* to or by *Orfordness*. and round the *Long-Sand-Head* into the *Downs*, and down the *South-Channel* into the *Downs*, and from or by *Orfordness* up the *North-Channel* and the *Thames* and *Medway*, by 5 *Geo.* 2. *c.* 20. And pilotage into and out of the port of *Liverpool* by 37 *Geo.* 3. *c.* 78.

every such establishment (*f*). An account of these establishments, and of the parts to which they relate, would be improper in a general treatise; and masters of vessels may easily acquaint themselves with the regulations on this subject relating to the particular navigation, in which they are employed. I [182] shall therefore only mention a few decisions which appear to be of more general interest.

The statute which requires an established pilot to be taken on board to conduct ships from *Dover*, *Deal*, or the *Isle of Thanet*, up the *Thames* or *Medway*, contains an exception, allowing "the master or mate, of any "ship or vessel, or part-owner, residing at *Dover*, *Deal*, "or the *Isle of Thanet*," to conduct his own ship from any of those places up the said rivers (*g*). The meaning of this clause appears sufficiently obvious; yet it was once contended, that a master and part-owner, not resident at either of those places, might pilot his own ship up the *Thames*, on his return from a foreign voyage to *London*. But the Court of King's Bench thought the meaning of the Legislature to be otherwise, and determined that the master was subject to the penalty imposed by the statute (*h*).

But both this statute, and that (*i*), which regulates pilotage *down* the river *Thames*, apply only to ships in the course of their navigation. And the Court of King's Bench decided that the *mate* of a ship engaged in the *Lisbon* trade, who steered the ship, which at the time was not quite cleared of her homeward cargo, and had a custom-house officer on board, down the river *Thames*

(*f*) *Law v. Hollingsworth*, 7 Ter. Rep. K. B. 160.
(*g*) 3 *Geo.* 1. *c.* 13.
(*h*) *Kemler v. Blanchard*, 2 Blac. 690. 5 Burr. 2602.
(*i*) 5 *Geo.* 2. *c.* 20.

[183] from *Horsleydown New-stairs* to *Cherry Gardens*, being about half a mile, and from thence to *Fountain Stairs*, was not subject to the penalty: for otherwise the station of a ship could not be changed for the purpose of delivering or receiving goods at different wharfs without the expence of pilotage (*k*). In like manner, where a ship had been conducted by a regular pilot up the river *Thames* to *Limehouse-hole*, and was left by him, and afterwards moored there, but being forced by the wind upon the mud, lay four days in a bad situation, and it becoming dangerous for her to remain there till the tide should ebb again, she was conducted by a *waterman* about a mile and a half further up the river; the Court referring to its former decision, and considering the voyage in this case to have been ended, when the ship was left at *Limehouse* by the pilot, determined that the waterman was not subject to the penalty (*l*).

The charge of pilotage is regulated at different places by usage or by statute, and generally increases in proportion to the depth of water which the vessel draws. This charge, if the service is performed in a river within the body of a county, cannot be recovered by a suit in the Court of Admiralty (*m*). (1)

(*k*) *Rex v. Lambe*, 5 Ter. Rep. K. B. 76. & *Nolan's* Rep. 156.

(*l*) *Rex v. Neale*, 8 Ter. Rep. K. B. 241. In this case it was stated, that the ship might have been removed to the pier either immediately above or below *Limehouse-hole*, and have been perfectly safe without going any further: And therefore the case was not within the *seventh* section of 3 *Geo.* 1. *c.* 13. which provides that the Act shall not extend to hinder any person from assisting a ship in distress at any time.

(*m*) *Ross v. Walker*, 2 Wils. 264.

(1) A pilot, while on board, has the absolute and exclusive control of the ship, and is considered as master *pro hac vice*. It

seems therefore that the master of the ship is not liable for any injury happening to another vessel by the fault or negligence of the pilot, at least if he be not on board at the time of the injury. Snell v. Rich, 1 John. Rep. 305. But the owner of the ship is in such case liable, although the pilot be appointed by public authority. Jackson v. Winchester, 4 Dall. Rep. 205. and Fletcher v. Braddick, 2 N. Rep. 82 And a suit in the admiralty lies to recover damages. The Thames, 5 Rob. Adm. Rep. 308.

And if captors neglect to take a pilot on board, and the ship be lost in consequence, the court of admiralty will decree restitution in value. The William, 6 Rob. Adm. Rep. 316.

See Laws of Oleron, art. 23. Molloy b. 2. ch. 9. sect. 3 & 7.

PART THE THIRD.

OF THE CARRAIGE OF GOODS IN MERCHANT SHIPS.

CHAPTER THE FIRST.

OF THE CONTRACT OF AFFREIGHTMENT BY CHARTER-PARTY.

1. THE contract by charter-party, of which it is here intended to treat, is, as I have before observed, a contract, by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. A ship may indeed be let for other purposes, as to be employed in warfare, or the fishing, coasting, or other trade, under the entire management of the hirer; or by way of mortgage, reserving at least a temporary right of management to the letter; or one part-owner may let his share to another. But contracts of this nature do not form the subject of the present inquiry.

The term charter-party is generally understood to be a corruption of the Latin words *charta-partita* (*a*):

(*a*) *Hargrave's* note on 1st Inst. 229.

Pothier, traite de charte-partie, num. 1. gives the same etymology of this word from *Boerius*, but with a different explanation. "It was "formerly usual," says *Boerius*, "in *England* and *Aquitaine*, to re- "duce contracts into writing on a "chart, divided afterwards into "two parts from top to bottom, of "which each of the contracting "parties took one, which they "placed together and compared, "when they had occasion to know "the terms of their contract. If from this account we are to understand that the contract was only once written, and the paper or parchment afterwards cut in two, the practice must have been very inconvenient, as neither party could inform himself in the absence of the other of the stipulation he had engaged to perform.

the two parts of this and other instruments being usually written in former times on one [185] piece of parchment, which was afterwards divided by a straight line cut through some word or figure, so that one part should fit and tally with the other, as evidence of their original agreement and correspondence, and to prevent the fraudulent substitution of a fictitious instrument for the real deed of the parties. With the same design indentation was afterwards introduced, and deeds of more than one part thereby acquired among English lawyers the name of Indenture. This practice of division however has long been disused, and that of indentation is become a mere form.

I propose in the present chapter to consider the modes in which this contract may be made, and to mention the usual stipulations contained in a charter-party, and some particular covenants, that have furnished occasion for the decision of a Court of Justice: reserving the consideration of the general duties, that arise as well out of the contract for conveyance in a general ship, as of this species of contract, for distinct [186] chapters hereafter.

2. This instrument, when the ship is let at the place of the owners' residence, is generally executed by them, or some of them, (and frequently by the master also,) and by the merchant or his agent. In a foreign port it must of necessity be executed by the master only, and the merchant or his agent, unless the parties have an agent resident in such port, authorized to this purpose by deed or letter of attorney under seal.

I have before observed, that the execution of a charter-party by the master, although said to be done on behalf

of the owners, does not furnish a direct action, grounded upon the instrument itself, against them. This depends upon a technical rule of the law of *England* (*b*), applicable as well to this as to other cases, and not affected by the mercantile practice of executing deeds for and in the name of absent persons: the rule of the law of *England* being, that the force and effect, which that law gives to a deed under seal, cannot exist, unless the deed be executed by the party himself, or by another for him, in his presence, and with his direction; or, in his absence, by an agent authorized to do so by another deed: and in every such case the deed must be made and [187] executed in the name of the principal (*c*). The agent indeed, either of the owner or merchant, may, and sometimes does, execute a charter-party, and covenant in his own name for performance by his principal, so as to bind himself to answer for his principal's default, by force of the deed. And in an action to recover freight or demurrage, claimed in pursuance of a charter-party by deed, the declaration must be specially framed on the deed itself (*d*).

Another technical rule of the law of *England*, applicable also to the contract by charter-party, should be noticed in this place. If a charter-party is *expressed to be made between certain parties*, as between A. and B. owners of a ship, whereof C. is master of the one part, and D. and E. of the other part, and purports to contain

(*b*) *Harrison v. Jackson & others*, 7 Ter. Rep. 207. and *Horsley v. Rush & another*, (the case of a charter-party) there cited.

(*c*) If C. D. by a proper deed authorize A. B. to execute a bond or other deed for him, A. B. may do this either by writing "C. D. by A. B. his attorney," or by writing "A. B. for C. D." provided he delivers the instrument as the deed of C. D. *Wilks & another v. Backe*. 2 East. 142.

(*d*) *Atty v. Parish*, 1 B. & P. New Rep. 104.

covenants with C. nevertheless C. cannot bring an action in his name upon the covenants expressed to be made with him, nor give a release of them, even although he seals and delivers the instrument (*e*). But if the charter-party is *not expressed to be made between parties*, but runs thus: This charter-party indented witnesseth, that C. master of the ship W. with consent [188] of A. and B. the owners thereof, lets the ship to freight to E. and F. and the instrument contains covenants by E. and F. to and with A. and B; in this case A. and B. may bring an action upon the covenants expressed to be made with them; although, unless they seal the deed, they cannot be sued upon it (*f*). This latter therefore is the most proper form.

3. By this contract a ship is let for a voyage to one or more places: the freight is expressed to be a sum of money, for the entire ship, or an entire part of the ship, or for each ton or other portion of its capacity; and this sum is again either a gross sum for the whole voyage or voyages, or a particular sum for every month or week of the ship's employment; sometimes also the freight is expressed to be a certain sum for every ton, cask, or bale of goods put on board, in which case the merchant usually covenants not to put on board less than a specified number of tons, casks, or bales; and where the payment is to be by the ton of goods, it is usual and proper to add, "and so in proportion for a less quantity than "a ton," as it was formerly decided in a case where these words were omitted, that the owner could recover nothing for a hogshead (*g*). These variations in the

(*e*) *Scudamore v. Vandenstene*, 2 Inst. 673. and see *Gilby v. Copley*, 3 Lev. 138.

(*f*) *Cooker v. Child*, 2 Lev. 74.

(*g*) *Rea v. Burnis*, 2 Lev. 124.

mode of paying the freight have given rise to [189] some questions and decisions on that article, which will be more properly noticed in the chapter on freight.

4. The merchant, who has so hired a ship, may lade it either with his own goods, or if he has not sufficient, may take in goods of other persons; or he may wholly underlet the ship to another. By the *French* Ordinance, under-letting at an advanced price is prohibited (*h*): a wise regulation, though not adopted by our law, and perhaps not rendered necessary by the practice of our merchants. If it be necessary, a clause may easily be introduced into all charter-parties to prevent the practice.

5. The charter-party usually expresses the burthen of the ship (*i*), and by the *French* Ordinance it is required to do so (*k*). A mistake in the amount of the burthen may in some cases be prejudicial to one party or the other. The *French* Ordinance provides that the master, who declares his ship to be of a burthen exceeding the truth, shall answer the merchant in damages, but that an error shall not be deemed to exist, unless it exceeds a *fortieth* part (*l*). According to *Molloy*, if a ship be freighted by the ton, and found of less burthen than expressed, the payment shall be only for the real burthen (*m*).

And if a ship be freighted for *two hundred* tons, [190] or *thereabouts*, the addition of *thereabouts*, says the same author, is commonly reduced to be *five* ton more or less. The wise provisions of the statutes for registering *British* ships, will probably prevent

(*h*) Liv. 3. tit. 3. *fret.* art. 27.
(*i*) *See* on this head *Straccha de navibus*, par. 3. num. 4. ad. 14. inclusive.
(*k*) Liv. 3. tit. 1. *Charte-parties*, art. 3.
(*l*) Liv. 3. tit. 3. *fret.* art. 4 & 5.
(*m*) *Molloy*, book 2. chap. 4. s. 8.

any mistake in this matter, and certainly furnish the means of detecting a wilful misrepresentation (*n*).

6. The contents of this instrument are varied according to the nature of the intended voyage, or the will of the parties; but the usual stipulations on the part of the owner, or master, are, that the ship shall be tight and staunch, furnished with all necessaries, for the intended voyage, ready by a day appointed to receive the cargo, and wait a certain number of days to take it on board. That after lading she shall sail with the first fair wind and opportunity to the destined port (the dangers of the seas excepted) and there deliver the goods to the merchant or his assigns in the same condition they were received on board; and further, that during the course of the voyage the ship shall be kept tight and staunch, and furnished with sufficient men and other necessaries, *to the best of the owner's endeavours* (1).

(*n*) See part 1. chap. 2. Indeed it is now usual to say so many tons *register measurement*.

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(1) But it seems the covenant that the ship shall be tight and strong, and equipped for the voyage, is not a condition precedent to the recovery of freight. If the ship has been actually employed by the charterer, the freight becomes payable; but if in consequence of the neglect of the owner to make the ship tight and strong, the charterer has been prevented from any use of the ship, it is a complete bar to an action for freight, because the consideration of the covenant to pay freight, *wholly* fails. However in the first case the charterer has his remedy to recover damages for any injury sustained by the neglect of the owners to keep the ship tight and strong. Havelock v. Geddes, 10 East. Rep. 555. And as ships are liable to accidents in the course of the voyage, by which repairs become

The owner may indeed, and sometimes does, by special clauses make himself still further liable, and render himself answerable in the case of accidents or misfortues, which otherwise would furnish him with an excuse. As in the case of a charter-party made [191] with the commissioners of the transport office, by which the owner covenanted that the ship should be manned with a specific number of men in proportion to her bulk, and that the whole number should be constantly on board, and which contained a proviso that the commissioners should be at liberty to mulct and make such abatement out of the ship's pay, which was a fixed sum for 12 months, as they should think reasonable, "upon the loss of time, breach of orders, or neglect of duty by the master, *or from the ship's inability to execute or proceed on the service on which she might be employed*, being made appear," it was held that the commissioners had a right to make an abate-

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necessary it seems that if the hire be by the month, freight does not cease to accrue during the time exhausted in making those repairs, at least if there be not neglect and delay on the part of the owner. id. ibid. Nor does a covenant to load a *complete* cargo for the freighter or charterer, at a specified rate for hemp, iron, &c. and therewith to proceed on the voyage, constitute a condition precedent, so that a recovery cannot be had for the delivery of a *short* cargo. Ritchie v. Atkinson. 10 East. Rep. 295. But the remedy for the freighter or charterer, is upon the contract for damages. Atkinson v. Ritchie, 10 East. 530. And in such action a well grounded apprehension of a hostile embargo, is no defence to the master or owner. id. ibid. See also the general duty of the owner to keep the ship in repair. Post, 223. note. Putnam v. Wood, 3 Mass. Rep. 481.

ment, a service to which the ship was ordered at *Quebec*, having been delayed for a considerable time, from want of mariners, although the want was occasioned by the death of some of the original crew, who had died of the small-pox in the course of the voyage thither, the desertion of others at that place from fear of the distemper, and it was impossible to procure a fresh supply of hands during the time (*o*).

On the other hand, the merchant usually covenants to load and unload the ship within a limited number of days after she shall be ready to receive the cargo, and after arrival at the destined port; and to pay the freight in the manner appointed. It is usual also for each of the parties to bind himself, his heirs and executors, and the owner or master the ship and [192] her freight, and the merchant the cargo to be laden, in a pecuniary penalty for the true performance of their respective covenants. Frequently also it is stipulated that the ship shall, if required, wait a further time to load and unload, or to sail with convoy, for which the merchant covenants to pay a daily sum. This delay, and the payment to be made for it, are both called *demurrage*. Sometimes also particular clauses are introduced in favour of the owners, to take away their responsibility for embezzlement of the master, or other matters, for which they would otherwise be answerable.

7. But although the ship and freight are by the terms of a charter-party expressed to be bound to the performance of the covenants on the part of the owners or master, and this is conformable to the maritime law; yet, as I have before observed (*p*), there does not ap-

(*o*) *Beatson v. Shank & others*, 3 East. 233.

(*p*) *Ante*, part 2. chap. 2. sect. 5.

pear to be at present any mode of obtaining in this country the benefit of the security of the ship itself in specie, for the performance of such a contract made here.

Neither can the owners in all cases have the full benefit of the clause, by which the cargo is expressed to be bound to the payment of the freight and performance of the covenants on the part of the freighter or merchant.

To this purpose the following case is in point. [193] Two persons, who were factors, hired a ship of one *Paul* at the rate of 48*l. per month*, and executed a charter-party, by which the goods to be put on board were made liable to him, and they had power to appoint the master and mariners. Some merchants in the *West-Indies* loaded the ship with goods, and allowed the factors 9*l. per ton* for the carriage. The factors, who had thus chartered the vessel in their own name, became bankrupts. *Paul* instituted a suit in the Court of Chancery, to compel the merchants to pay him for the hire of the ship, insisting that they were liable to do so by reason of this clause in the charter-party. But the *Lord Chancellor*, *Hardwicke*, decided that he should recover of them no more than they had engaged to pay the factors for the freight, and that they were not liable to make up the deficiency to him. His Lordship observed that by the general law the cargo is liable to pay the freight: but that in this case the 48*l. per month* was improperly termed the freight of the goods, being rather the hire of the ship, that the factors had made an agreement with the master on their own account, and not on the part of the merchant, and therefore the merchants were not liable; otherwise they would be in the hardest case imaginable, for they would be liable to any private

agreement between the occupier of a ship and the original owners of it. "A person," said his Lordship, "that lets out a ship to hire, ought to take care "that the hirer is a substantial man, it is his [194] "business to look into this; and if the persons "who hire are not competent, the master must suffer for "his neglect. Whatever hardship therefore there may "be on the one hand to the person, who lets out to hire, "the hardship is much greater on the other side; and "what gives additional weight to the merchant's case, is "the great convenience this gives to trade in gener-"al (*q*)."

8. In all maritime transactions expedition is of the utmost importance, for even by a short delay the season or object of a voyage may be lost. And therefore if either party is not ready by the time appointed for the loading of the ship, the other may seek another ship or cargo, and bring an action to recover the damages he has sustained. Nay, according to *Molloy*, even if part of the lading be put on board, and the merchant cannot furnish the residue, the owner may annul the contract and lade his ship with other goods(*r*); but the same author adds, that it is by no means prudent to do so without good reason and deliberation. I apprehend the author, who here alludes to a covenant to furnish an entire lading, must be understood to speak of a part insufficient in value to answer the freight engaged to be paid; for if goods of the merchant, who hires the ship, sufficient in value to answer such freight, be put [195] on board, it seems reasonable that the merchant, upon whom the loss of the deficiency will fall, should

(*q*) *Paul v. Birch*, 2 Atkins 621. (*r*) *Molloy*, book 2. ch. 4. s. 3.

have the right to take the loss upon himself, and order the ship to sail. And accordingly the *French* Ordinance directs, that if the ship be freighted by the great, and the merchant do not furnish a full lading, yet the master shall not without his consent take in other goods to complete the lading, nor without accounting to him for the freight of such goods (s); which direction is consonant to general principles of law; for the hirer has a right to use the thing hired in any manner most agreeable to himself, not differing from the purpose, for which it was let to him. And in this particular case the sale of the merchant's goods may be prejudiced by taking other commodities to the market, for which he has destined them. But as the lading is the owner's best security for the payment of the freight, if goods sufficient to answer such payment are not put on board, and the merchant is known, or reasonably suspected to have become insolvent, the owner will incur no risk of damages by annulling the contract, or taking other goods to secure his freight, which, if it can be done, is the better method (1).

(s) Liv. 3. tit. 3. *Fret.* art. 2. *Pothier*, Charte-partie, num. 20.

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(1) Questions sometimes arise as to which party is to do the first act, in relation to a mercantile transaction. The plaintiff and defendant agreed to enter into copartnership for the purpose of making four shipments to Buenos Ayres. The plaintiff, among other things, covenanted to transfer to the partnership all his powers under a royal licence, (which he had obtained) and to send four American ships to Buenos Ayres to be laden with licit goods, to be chosen, to the amount of $15,000 for each vessel, by the plaintiff, and not above $25,000 at the first cost, the *funds and vessel to be furnished by the defendant.*

9. A charter-party, like every other deed, *takes its effect* and operation from the day, on which it is sealed and delivered, and not from the day, on [196] which it bears date, if different from the day of the delivery, unless there be words of reference to the day of the date. And therefore, where by a charter-party dated the 9th day of *October*, but not delivered till the 28th of *October*, one party covenanted to pay a moiety of the value of all the corn "which then was and there-"after should be laden on board the ship," it was held that he was not liable to pay for any corn, that was not really on board the ship on or after the 28th of *October*. In fact, the corn was cast away between the 9th and the 28th of *October* (*t*).

(*t*) *Oshey v. Hicks*, Cro. James, 263.

The plaintiff also bound himself to make choice of the articles, or to send samples, if necessary. The defendant agreed that, within a month from the date of the contract, the first expedition should proceed from Boston, and the three others successively with the interval of a month; and in case of default in sending the expedition in due time, the contract, as to that expedition was to be void. In an action of covenant, the plaintiff alleged as breaches, that the defendant did not furnish the vessels to be loaded at Boston, and that the first vessel did not sail from Boston within a month. The defendant pleaded among other pleas, that the plaintiff did not choose or select the goods necessary for the first voyage; and on demurrer, the Court held that the plea was bad; for selecting the goods was not a condition precedent, and that in order of time the defendant was bound to do the first act, to wit, provide a vessel. Barruso v. Madan, 2 John. Rep. 145.

10. The word "*days*" used alone in a clause of *demurrage* for unlading in the river *Thames*, is said to be understood of working days only, and not to comprehend sundays or holidays, by the usage among merchants in *London* (*u*) ; but it is much better to mention *working*, or *running*, days expressly, according to the intention of the parties.

The payment of *demurrage*, stipulated to be made while a ship is waiting for *convoy*, ceases as soon as the convoy is ready to depart; and such payment, stipulated to be made while a ship is waiting to receive a *cargo*, ceases, when the ship is fully laden, and the necessary clearances are obtained, although the ship may
[197] in either case happen to be further detained by adverse winds or tempestuous weather. And if the ship has once set sail and departed, but is afterwards driven back into port, the claim of demurrage is not thereby revived. This appears by the two following authorities :

First, as to *waiting for convoy*. Two ships, the *Swallow* galley and the *Beak* galley, were hired by charter-party, for a voyage from *Leghorn* to several ports in the *Mediterranean*, and from thence to *London*, and it was stipulated, that after receiving their cargo at the ports in the *Mediterranean*, they should sail directly for *Gibraltar*, and there remain until some convoy should then next present from thence, bound either for *Lisbon* or *England*, and sail with such convoy either for *Lisbon* or *London*, and if the convoy should not proceed directly for *England*, should remain at *Lisbon* until some convoy should present from thence for *England*, and then sail with such convoy ; and if the convoy should not go

(*u*) *Cochran v. Retbergh & others.* 3 Espin, N. P. Cases, 121.

into the *Downs*, then they should wait at the first port they should make in *England*, for convoy from thence to the *Downs :* and the merchants covenanted to pay in *London* 6*l.* per day for the *Swallow*, and 7*l.* per day for the *Beak*, for each day that they should WAIT FOR CONVOY at *Gibraltar*, *London*, or elsewhere, during the voyage, above the space of *twenty* days in the whole, during which *twenty* days they were to lie at the charge of the commanders. The ships hav- [198] ing received their lading, sailed for *Gibraltar*, and arrived there on the 11th of *March* 1708. On the 25th of *September*, *Sir John Leake* passed by *Gibraltar*, but refused to take them under his convoy, having appointed Captain *Moody* for that purpose. On the 27th of *September*, Captain *Moody* arrived at *Gibraltar ;* and staid there till the 6th of *October*, on which day the ships, after having waited 148 days, sailed with him for *Lisbon*, arrived there with him on the 16th of the same month, and staid with him there till the 14th of *November*, and then sailed with him for *England*, and arrived with him at *Falmouth* on the 2d of *December ;* and there the two ships waited till the 17th of *January*, when they sailed from thence, and joined captain *Moody* at *Plymouth*, he having previously left *Falmouth*, and put into *Plymouth*, and sailed with him to the *Downs ;* and ultimately arrived in safety at *London*. Part of the delay of the two ships at *Falmouth*, and of Captain *Moody* at *Plymouth*, was occasioned by tempestuous weather. The masters claimed demurrage for the whole period of the several detentions after the first *twenty* days. The merchants insisted that nothing was due for the time they waited, *after Captain Moody joined them :* and indeed at first insisted, that they ought to have sailed with *Sir John*

Leake, but this was held to have been impossible. The *Lord Chancellor*, *Cowper*, declared, that demurrage was payable both during the time that the ships wait-
[199] ed for the arrival of convoy, and during the time that the convoy was not ready to sail; for if the convoy was not ready or able to sail at any time when the ships were both able and ready, the staying of the ships for the convoy, was the same thing as if no convoy was near at hand; but that no demurrage ought to be allowed while the ships and their convoy staid for want of wind, or were detained by contrary winds; and upon this principle it was ultimately decided by the *Lord Chancellor* (*v*), and afterwards by the House of Lords upon appeal (*x*), that demurrage should not be paid for such portion of the detention at *Falmouth*, as was thought properly attributable to the weather, but that it should be paid for all the rest of the time that the ships had waited there, and for the whole period of their stay at *Lisbon* and *Gibraltar*, after the expiration of the first *twenty* days.

SECONDLY, as to *waiting for a cargo*. *Jamieson & Co.* merchants at *Leith*, having contracted with *Atkins & Co.* merchants at *St. Petersburgh*, for a quantity of tallow, which, as the latter represented, would be ready for delivery in the beginning of *August*, sent the ship *Bell*, whereof *John Laurie* was owner, and one *Anderson* master, to *Cronstadt*, under the following
[200] letter of instructions delivered to the master, which was the only evidence of the contract between the parties. "You will on your arrival at *St.*

(*v*) *Lannoy & another v. Werry & another*, 2 Bro. P. C. 60.

(*x*) The only alteration of the Chancellor's decree made in the House of Lords, was in the number of days, for which demurrage should be paid at *Falmouth*.

" *Petersburgh*, deliver our inclosed letter to *Messrs.* " *Atkins, E. Rigail, & Co.* to whom we address your " ship the *Bell*. They will ship 100 tons of tallow, and " get you what deals and battens you may want to fill " up your ship—you have a provisional order to *Messrs.* " *G. Scougal & Co.* for 40 tons of iron, to *Messrs. S. &* " *R. Anderson;* if they cannot ship it in time, you may " apply to *Messrs. Hill, Gazalett, & Co.* to whom you " have a letter; failing them, you may make inquiry " through the factory, and if you can't get any, you'll " directly load without it.—*Observe you must get clear* " *and sail before the 1st September N. S.* as the premi- " ums of insurance advance greatly after that date.— " About this we wrote particularly to *Messrs. Atkins,* " *E. Rigail, & Co.* and we hope they will attend to it. " We have no objection to your taking any goods on " freight to the extent of 50 or 60 tons, but the ship " must not be detained for them: and with respect to " deals, you will be at great pains in wracking them."

The ship arrived at the port of destination on the 22d of *July* 1787, and the master applied to *Atkins & Co.* according to the instructions. They informed him that the tallow, which was to come by water from the interior of the country, could not be expected till toward the end of *August;* and in fact, on account of the dryness of the season, which retarded the inland [201] navigation, it did not arrive at *St. Petersburgh* till *October*, and was not shipped till near the end of that month. The master made a protest against the merchants for not loading the ship by the *first* of *September;* but waited for the tallow by the directions of *Atkins & Co.* and, as it seemed, under an opinion that he was bound to do so. The lading was completed, and the

ship's clearances obtained on the 28th of *October*, and the ship, having waited a few days for a wind, sailed out of the mole of *Cronstadt*, but soon meeting with adverse winds and frost, was forced to return to *Cronstadt*, and was there frozen up, and remained until the 11th of *May*. The winter began earlier than usual. Upon the arrival of the ship and delivery of the cargo at *Leith*, the owner claimed of *Jamieson & Co.* freight at the usual rate of the voyage; demurrage from the *first* of *September* till the 11th of *May*, and an indemnification against a claim made upon him by another merchant, for whom he had shipped some flax soon after the arrival of the vessel at *Cronstadt*, for damages occasioned by the delay in bringing the flax to *Leith*.

The case was litigated in several courts in *Scotland*, and was at last brought by appeal to the British House of Lords. It was admitted on both sides, that the master might by law have returned empty, or have obtained another cargo after the *first* of *September*, but the owner of the ship contended, that as the master had waited at the request of the correspondents of *Jamieson*
[202] *& Co.* they were answerable for all the damage arising from that delay.

The House of Lords decided that *Jamieson & Co.* should pay only the usual freight, and a compensation in the nature of demurrage for the period between the 1st of *September* and the 29th of *October* (*y*). This decision was conformable to one of the determinations, which had taken place in *Scotland*, and also to the usage of trade, as represented by several merchants in *London*, who had been examined in the cause, and who deposed,

(*y*) *Jamieson & others v. Laurie*, *Nov.* 1796. Reported 6 Bro. P. C. decided in the House of Lords 10. p. 474. 2nd. edit.

that the claim of demurrage ceases as soon as a ship is cleared out and ready for sailing.

At a late trial before the present *Chief Justice* of the Court of Common Pleas, which arose upon a charter-party, whereby the time for the ship's waiting to receive and deliver the cargo was limited to 50 running days, with permission to the freighter to keep her a further time upon payment of *5l. per day;* and the owner claimed demurrage for 20 days, while the ship was waiting to deliver the goods in the *London* Dock; the period of fifty days having been in the whole exceeded: the defence made was, that the freighter intending to bond and warehouse the goods, had done all that was necessary on his part for that purpose, and that the Dock company had delayed to land and warehouse them. But the *Chief Justice* held the freighter answerable for this delay, as it would not have [203] happened if he had thought fit to discharge the duties instead of giving security for the payment (*z*).

11. The general rule, which our Courts of Law have adopted in the construction of this as well as other mercantile instruments, is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade, to which the contract relates. Few cases however on this head have received a judicial determination. I will here mention such of them, as do not more properly relate to the other divisions of this treatise.

(*z*) *Struck v. Tennant*, Guildhall Sit. after T. T. 1806, before *Sir James Mansfield*, Ch. J The learned Judge also said, that he thought the freighter would have been answerable in this action, if the company had *improperly* refused or delayed to unload the vessel, especially as he had only pleaded generally that he did not detain the ship.

12. In a case which happened in the beginning of the reign of King *Charles the First*, the owner or master covenanted that his ship should sail with the first wind on a voyage to *Cadiz;* and the merchant covenanted that if the ship should go on the intended voyage and return to the *Downs*, he would pay a certain sum; to recover this sum an action was brought. The merchant pleaded in his defence, that the ship did not sail with the next wind; which fact was admitted [204] by the plaintiff. But the Court held that the substance of the covenant, and primary intention of the parties, were, that the ship should perform the voyage; and not that the ship should sail with the next wind, which changes every hour; and that the merchant must pay the money (*a*). But although it appears by this case that the owner will not absolutely lose his freight by a delay in the commencement of the voyage, if the voyage be afterwards performed; yet if the merchant sustain any injury by such delay, he will be entitled to a compensation in damages proportioned to his loss (*b*).

13. The contract by charter-party is in general of that kind which the lawyers call reciprocal, that is mutually obligatory upon each party; but nevertheless the parties may by particular clauses render it obligatory upon one, and optional to the other. Thus where the master of a vessel bound on a voyage to the island of *Madeira* covenanted by a charter-party, that he would

(*a*) *Constable v. Cloberie*, Palmer, 597.
(*b*) Note on the *Guidon*, cap. 7. sect. 10. p. 240. *Roccus*, not. 56. *Straccha de nautis*, par. 3. num. 3, 4, and 5. *Malyne*, p. 98.*

* See post, p. 313. Hall v. Gazenove, 4 East. Rep. 477. cited in note.

directly as wind and weather would permit, after the discharge of his cargo at that island, sail and proceed to *Winyaw* in *South Carolina*, or as near thereto as he could safely get: and there stay *forty* running days from the time of such arrival, if not sooner dispatched; and load his ship with such rice and other goods as the merchant's agents, &c. should tender to be laden; [205] in consideration whereof the merchant agreed to pay him freight at the rate of 4*l.* 10*s.* *per ton* for every ton delivered at the port of *London*, and also two-third parts of port-charges, pilotage, &c. which charter-party contained the following *proviso*—"That if the said ship "should not be arrived at *Winyaw* aforesaid by the *first* "day of *March* next ensuing the date of the said charter-"party, then and in such case it should be in the option "of the merchant, his factors or assigns, on the said "ship's arrival at *Winyaw*, either to load the said ship "on the terms aforesaid, or not; or at the then current "freight given to ships loading at *Winyaw* for the voyage "aforesaid; or to refuse the said ship entirely; so al-"ways that such the intention of the said merchant, his "factors or assigns, was declared to the master of the "said ship within *forty-eight* hours after his application "to the factors or assigns of the said merchant at *Win-"yaw*." And on this charter-party the merchant brought his action; alleging, *first*, that the ship did not sail and proceed to *Winyaw*, or as near thereto as she could safely get, in order to load, &c. but that the master (the defendant) wilfully absented himself therefrom. And, *secondly*, that the master did not on the *first* of *March*, or at any time afterwards, arrive at *Winyaw*, but wilfully absented himself therefrom. In defence to which action the master pleaded, that he did

proceed with all convenient speed and sail to the
[206] island of *Madeira*, but by reason of contrary winds and bad weather, and from no other cause, was prevented from arriving there till the 16th of *February*, so that it was impossible for him to discharge his outward-bound cargo at *Madeira*, and after such discharge to arrive at *Winyaw* by the *first* of *March*: the facts of which plea the plaintiff admitted to be true; and the question therefore was, whether or not, as the merchant had his option to load the ship or not, in the event of her arrival at *Winyaw* after the *first* of *March*, the master, having been unavoidably delayed in the previous voyage by no fault of his own, so as to render his arrival at *Winyaw* by that time impossible, was bound to sail thither on the chance of the merchant's choosing to give him a freight, when he should happen to arrive.

The Court held that by the terms of the charter-party the master had bound himself to do this. And *Lord Mansfield* said, "The plaintiff wanted a ship at "*Winyaw* in *Carolina* to load with rice, and therefore "he covenanted with the defendant to freight the ship "there, and the defendant covenants absolutely to go "thither, and in order to quicken the ship's arrival, "there is a *proviso*, that if he gets there by the *first* of "*March* he is to be certain of a freight, but if he does "not arrive there before the *first* of *March*, then the "plaintiff was to declare in *forty-eight* hours, whether "he would freight the ship or not. The defendant
"therefore thereby became the insurer of the
[207] "risk of his getting there before the *first* of
"*March*, in which event he was sure of a freight;
"but he still had a general chance of getting a freight,
"even though he should not arrive till after that time.

"The words are positive and express '*that he should go* "*thither.*' The parties plainly meant that the ship was "to go thither, and the consideration fails by his not "going (*c*)."

14. The charter-parties of the *East-India Company* usually contain the following clauses (*d*): "As touch- "ing the freight to be paid or allowed by the company, "it is agreed, and the company covenant with the said "part-owners, that the company shall and will, in case "and upon condition that the ship performs her voyage, "and arrives at *London* in safety, and the said part- "owners and masters do perform the covenants on their "part, and not otherwise, well and truly pay and allow "the freight herein mentioned."

"It is hereby agreed, that in case the ship does not "arrive in safety in the river *Thames*, and there make "a right delivery of the whole and entire cargo and la- "ding on board the said ship as aforesaid, the company "shall not be liable to pay any of the sums of money "hereinbefore agreed to be paid for freight and demur- "rage, nor subject to any demands of the said "part-owners or master on account of the said [203] "ship's earnings in freight, voyages for the com- "pany, or on account of any other employment; any "other law, practice, or custom notwithstanding."

Upon the effect of these clauses a question arose in the case of the ship *York*, which had been chartered by the company, and on her return home from *India* met with a violent storm off *Margate*, where she was strand- ed and sunk under water; by this misfortune a great part of her cargo (being saltpetre) was lost; the prin-

(*c*) *Shubrick v. Salmond*, 3 *Burr.* 1637.

(*d*) *Hotham & another v. E. I. Company*, Doug. 272.

cipal part of the remainder, which consisted chiefly of pepper, was greatly damaged by the sea-water, but was got out of the ship by persons sent down by the company, and brought to *London* in vessels, where a particular process was employed at a great expence to the company, to restore it in some degree, and render it marketable. The ship, after being in a great measure unloaded, was with much difficulty raised out of the water, and arrived in the port of *London*, with a small part of the cargo still remaining on board.

The company contended, that by the construction of the before mentioned clauses, they were wholly discharged from the payment of any freight or demurrage whatsoever. But a special jury of merchants, before whom the cause was tried, and the Court of King's Bench, by whom the verdict of the jury was reviewed,
[209] held, that freight was to be paid for all the goods delivered; and demurrage as specified in the charter-party.

15. The same misfortune also gave occasion to two other questions, which arose in the same cause, upon the meaning of the following clauses in the charter-party, *viz.*

"And if any of the homeward-bound cargo shall be "lost or undelivered into the said company's ware-"houses at the said ship's arrival in *England* (except that "no such payment shall be made if there happens an "utter inevitable loss of ship and cargo, nor shall any "other payment be made for such goods as shall neces-"sarily perish, or be cast into the sea for the preserva-"tion of the ship and cargo, than by an average to be "borne by ship, freight, demurrage, and cargo) the "part-owners, and master, shall pay or allow to the

"company the prime cost of such goods, and 30*l.* for "every 100*l.* on such prime cost.

"But if any of the homeward-bound cargo, when de- "livered into the company's warehouses in *England*, "shall be found to be prejudiced, wet, or damnified, by "any occasion or accident whatsoever, it shall be lawful "for the company to refuse such goods, and in such case "the part-owners and master shall take them, and allow "to the company the sum, which they are invoiced at, "with charges, customs, and duties, and in such case "the company shall pay no charges or freight "for the said goods so prejudiced, wet, or dam- [210] "nified, unless in case of damaged pepper, "which the part-owners and masters are to allow the "company for at the current price of sound pepper in "*London*, and the company are to pay the freight and "charges on such pepper, as if it were not damnified."

"But the said part-owners shall not be charged with "any sum of money in respect of goods damaged on "board the said ship, but such as shall, by the condi- "tion and appearance of the package thereof, or by some "other reasonable proof, appear to be *ship-damage;* any "thing herein contained to the contrary thereof in any- "wise notwithstanding."

Upon these clauses the jury, and afterwards the Court of King's Bench, were of opinion, First, that the own- ers were not liable to pay for goods lost or not delivered in consequence of this misfortune, that had befallen the ship. And Secondly, that they were not liable to pay or allow for any loss upon the pepper: and as to these points *Lord Mansfield* observed, "The question is, "whether the owners are to pay for the damage occa- "sioned by the storm, the act of God; and this must

"be determined by the intention of the parties, and the "nature of the contract. It is a charter of freight. "The owners let their ships to hire, and there never "was an idea that they insure the cargo against the per- "ils of the sea. The company stand their own [211] "insurers; words must be construed according "to the subject matter. What are the obliga- "tions upon the owners, which arise out of the fair con- "struction of the charter-party? why, that they shall "be answerable for damage incurred by their own fault, "or that of their servants, as from defects in the ship, "or improper stowage, such as mixing commodities to- "gether which hurt one another, &c. If they were lia- "ble for damages occasioned by *storms*, they would be- "come insurers (*e*)." "As to the other point, of the "goods lost, the whole is one entire contract, and must "be understood in a manner consistent with itself, and "it never could be intended that the owners should be "protected from the lesser loss, and remain answerable "for the greater."

The expence of saving the goods was held to be a general average, and the owners were held responsible for the whole extra expence of bringing the goods up from *Margate*.

16. Upon the effect of the before-mentioned clause, by which it is agreed, *that if the ship shall not arrive in safety in the Thames, the company shall not be liable for*

(*e*) The same question upon the construction of these clauses was submitted to the *House of Lords* upon a writ of error, in the case of *Tod v. The E. I. Company*; the House, after consulting the Judges, decided, according to the unanimous opinion of the Judges, that the owner was not liable to make satisfaction to the Company for the damage done to goods in the ship by *storm*. *May* 20th, 1788.

any freight or demurrage, another question arose in the case of the ship, *Winchelsea* (*f*), [212] which had been let to the company by a charter-party containing that clause, and whereby the company had covenanted to load the ship home within *three* months after her arrival in *India*, with a *proviso* however authorizing them to detain her in their service *a year* after the *three* months, at certain rates of demurrage therein specified. The company detained the ship in their service in *India*, and toward the end of the year after the *three* months sent her to *Fort Saint Davids*, where she arrived after the expiration of that year; and the master upon his arrival informed the president of that fort, that unless the company would allow demurrage after the rate of the charter-party, he would protest against them for all damages, loss of time, and other accidents; whereupon the president and council agreed that the owners should be allowed demurrage for so long time as the ship should be detained in the company's service in *India*. She was so detained some time longger, and before she had received any lading homeward was lost in a storm. The owners sued the company upon the charter-party. After a trial and verdict, and while the case remained for the judgment of the Court of King's Bench, the cause was compromised by the company's paying demurrage from the expiration of the year after the *three* months, until the time of the loss, with the costs. And *Lord Mansfield* then [213] declared, "that the Court was very clear that

(*f*) *Hume v. E. I. Company*, 1 Blac. 291. But *query*, whether the form of action was properly adapted to the case?

"the owners were entitled to no more," but declined giving any other opinion (1).

17. I have said that the construction of charter-parties shall be conformable to the usage of trade. Accordingly at the trial before *Lord Kenyon* of an action on a charter-party, by which it was stipulated that the merchant should have the exclusive use of the ship outwards, and the exclusive privilege of the cabin, the master not being allowed to take any passengers, at which trial the defendants insisted that under a charter-party so worded, it was the constant usage of trade to allow the master to take out a few articles for a private trade; his Lordship suffered evidence to be given to prove this usage, observing, that although *primâ facie* the deed excluded this privilege, yet he thought the deed might be

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(1) Upon the clause in the East-India Company's charter-parties, whereby the Company agree to allow 200*l.* per month for provisions, while the ship remains in India or China, to be computed from her delivery of the Company's dispatches, if any, "at the ship's *first consigned port*, until she should be dispatched from her last port in India or China, to return to Europe," is to be understood of her last *consigned port*, and not a port to which afterwards she may be compelled to go in distress for repairs. And the covenant to pay in England 14*l.* for each passenger, ordered on board the said ship by the Company's agents, is due, although the ship shall not arrive in safety in the Thames, this covenant having no reference to the above cited clause, sect. 16. Moffat v. East-India Company, 10 East. Rep. 468.

explained by uniform and constant usage, the usage being a tacit exception out of the deed (*g*).

18. But although the words of a charter-party may receive a liberal construction, yet the construction must not be inconsistent with their plain and [214] obvious meaning. And therefore in the case of a charter-party, by which a ship was to sail from *London* to join convoy, and proceed from thence to *Barcelona*, and there deliver her cargo; and *forty-one* running days were to be allowed to wait at *Portsmouth* for convoy, and to discharge the cargo at *Barcelona*, the said *forty-one* days to be accounted and commence at *Portsmouth twenty-four* hours after her arrival there, and at *Barcelona* the day the ship should be ready to deliver her cargo, and for all the time beyond the *forty-one* days *thirteen* shillings *per ton* were to be allowed for demurrage; *Lord Kenyon* held that the demurrage was only payable for delay beyond the *forty-one* days in waiting for convoy at *Portsmouth*, and in discharging the cargo at *Barcelona*, and not for the delays which the ship had experienced in waiting for convoy at *Falmouth*, to which place she was ordered to proceed from *Portsmouth* by the admiral's secretary; and at *Gibraltar Bay*, into which she sailed under the direction of one of the sloops appointed to convoy the fleet, the rest having been dispersed in a storm, and where she waited *twelve* days for convoy to proceed to *Barcelona* (*h*).

(*g*) *Donaldson & another v. Forer & others*, Guildhall Sittings, p. Mich. Term, 29 *Geo.* 3. Upon the evidence his Lordship thought the usage was proved, and *eleven* of the jurymen wished to find a verdict accordingly, but the *twelfth* insisting that he could not conform to the general opinion, as this was a positive contract, a juror was withdrawn by consent, and no verdict pronounced in the cause.

See the observations made by *Lord Eldon*, on the maxim of construing a mercantile instrument by usage, in the case of *Anderson v. Pitcher*, 2 Bos. & Pul. 164. And see 2 *Vesey*, 331.

(*h*) *Marshall v. De la Torre*, 1 Esp. N. P. Cases, 367.

It is probable that if the events, which took place in the course of this voyage, had been foreseen by the parties, the number of days would not have been confined to waiting for convoy at *Portsmouth* only, but [215] would have been expressed to be for waiting for convoy generally; but to have put such a construction upon this instrument, would have been to substitute other words for those, which the parties to it had thought proper to use. And the reader will observe, that in this case there was not (nor indeed could have been) any general usage of trade applicable to the stipulation in question (1).

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(1) Demurrage is never payable unless expressly stipulated. Therefore, where in a contract of affreightment, it was agreed that the ship should lay at Surrinam thirty-five days, to unload and reload, and the ship stayed thirty-five days, and the return cargo not being ready, she waited twenty days longer, at the request of the agent and consignee of the defendant, but who had no control over the ship, in an action of assumpsit for the demurrage of twenty days, it was held, that as the written contract contained no stipulation to pay demurrage, and no implied promise could arise from the act of the consignee of the goods, who was not authorized to bind the defendant to pay demurrage, the plaintiff was not entitled to recover. Robertson v. Bethune, 3 John. Rep. 342., Spencer J. dissenting. See in the same case the comments of the Court on the case of Jamieson v. Laurie, above cited, p. 199.

In cases of capture the Court of Admiralty regulates demurrage at its discretion. The Anna Catherina, 6 Rob. Adm. Rep. 10.

19. When goods are put on board in pursuance of a charter-party, the master is to sign for them bills of lading to the effect mentioned in the ensuing chapter.—The charter-party being the instrument and evidence of the contract for the conveyance, and the bill of lading the evidence of the shipping of the particular merchandize to be conveyed in pursuance of the contract (1).

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(1) But where there is a charter-party with the freighter, signed by the owners, no action lies against them on the bill of lading signed by the master, for the express contract under seal, in respect to the same subject matter, precludes it; but it might be otherwise if they themselves signed the bills of lading. Hunter v. Prinsep, 10 East. Rep. 378.

CHAPTER THE SECOND.

OF THE CONTRACT FOR CONVEYANCE OF MERCHANDIZE IN A GENERAL SHIP.

1. THE contract for the conveyance of merchandize in a *general* ship is that, by which the master and owners of a ship, destined on a particular voyage, engage separately with various merchants unconnected with each other, to convey their respective goods to the place of the ship's destination. It has been already [216] shewn (*a*) that this contract, although usually made personally with the master, and not with the owners, is considered in law to be made with them also, and that both he and they are separately bound to the performance of it.

2. When a ship is intended to be thus employed, it is usual in *London*, and other places, to give notice of the intention by printed papers and cards, mentioning the name and destination of the ship; her burthen and sometimes her force; and sometimes expressing also that the ship is to sail with convoy, or with the first convoy for the voyage, or other matters relating thereto. Such expression is an assurance or warranty to the merchant, who lades goods in pursuance of the advertisement, and becomes a part of the contract with him, although it be not afterwards contained in the bill of lading (*b*).

(*a*) Ante, part 2. chap. 2.

(*b*) Said to be so understood among merchants, &c. by the jury, in the case of *Rinquist v. Ditchell*, Sit. p. Mich. Ter. 40 *Geo.* 3. at

3. When goods are sent on board the ship, the master or person on board acting for him, usually gives a receipt for them, and the master afterwards signs and delivers to the merchant sometimes two, and sometimes three, parts of a bill of lading, of which the merchant commonly sends one or two to his agent, factor, or other person, to whom the goods are to be delivered at the place of destination, that is, one [217] on board the ship with the goods, another by the post or other conveyance; and one he retains for his own security. The master should also take care to have another part for his own use.

Guildhall.* This point however was brought before the Court of King's Bench in Mich. Term, 48 *Geo.* 3. The decision will be noticed in the Addenda, if it takes place in time.

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* This was decided in Rinquist v. Ditchell, referred to in the note under the text and reported. 3 Esp. Nisi Pr. Ca. 64. The case was on an action brought against the owner of the Ship Cromer, to recover damages to the value of the goods shipped on board of her under the following circumstances. The ship Cromer was put up at the Coffee as a general ship for Oporto, warranted to sail with convoy. The plaintiff shipped goods on board her, and effected a policy "on goods on board the Cromer warranted to sail with convoy." She did not sail with convoy, and was lost: and by reason of not complying with the warranty, the policy was void. The ship-broker proved that he had put up the ship as a general ship for Oporto, at the usual places at the Royal Exchange, and that the Captain had, during that time, been frequently at the Exchange, that he had signed bills of lading on which the ship was warranted to sail with convoy, and that handbills to that effect had been handed about. The Captain however denied having given any authority, so to represent the ship. Lord Kenyon decided that the owner was bound by the act of his agent the broker. If he had done it without authority, it was a question between him and the owner; the public had nothing to do with it. The representation of the ship's sailing with convoy was announced to the public in the usual manner, and was sufficient to bind the parties.

OLD FORM OF A BILL OF LADING.

I. W. } SHIPPED, by the grace of God, in good
N° 1. a 20. } order, by A. B. merchant, in and upon the good ship called the *John and Jane*, whereof C. D. is master, now riding at anchor in the river of *Thames*, and bound for *Barcelona* in *Spain*, 20 bales, containing 100 pieces of broad cloth, marked and numbered as *per* margin ; and are to be delivered in the like good order and condition at *Barcelona* aforesaid (*the dangers of the seas excepted*), unto E. F. merchant there, or to his assigns, he or they paying for the said goods *per* piece freight, with primage and average accustomed. IN WITNESS whereof, the master or purser of the said ship hath affirmed to three bills of lading of this tenor and date, one of which bills being accomplished, the other two to stand void. And so God send the good ship to her designed port in safety.

DATED at *London*.

The terms of this exception were altered about [218] five years ago, in consequence of an alarm taken by the ship-owners at the decision of a cause (*c*), that will be mentioned in a subsequent chapter ; and of late the exception is usually made in the following words ; (" *The act of God, the King's enemies, fire, and* " *all and every other dangers and accidents of the seas,* " *rivers, and navigation, of whatever nature and kind*

(*c*) *Smith v. Shepherd*, post, ch. 4. of this part, sect. 1.

"*soever excepted.*") But in the case of ships homeward bound from the *West-India* islands, which send their boats to fetch the cargo from the shore, there is introduced a saving out of this exception "*of risk of* "*boats, so far as ships are liable thereto.*" And in that case the whole clause is as follows: "*The act of God,* "*the King's enemies, fire, and all and every other dan-* "*gers and accidents of the seas, rivers, and navigation,* "*of whatever nature and kind soever, save risk of boats,* "*so far as ships are liable thereto, excepted.*" Other exceptions are and may be introduced, to take away the responsibility of the master and owners in various cases, for which they would otherwise be responsible.

In the above-mentioned form of a bill of lading the name of a consignee is mentioned, but sometimes the shipper or consignor is himself named as consignee, and the engagement is expressly to deliver to him or his assigns; and sometimes no person is *named* as consignee, but the terms of the instrument are, "*To be delivered,* "*&c. unto order, or assigns,*" which words are generally understood to im- [219] port an engagement on the part of the master to deliver the goods to the person, to whom the shipper or consignor shall order the delivery, or to the assignee of such person. This subject will be further considered in a subsequent chapter (*d*).

4. If there is any dispute about the quantity or condition of the goods, or if the contents of casks or bales are unknown, the words of the bill of lading should be varied accordingly.

By the *French* Ordinance it is required, that bills of lading should contain the quantity and marks of the

(*d*) Ch. 9. of this part. *Of stoppage in Transitu.*

merchandize, the name of the merchant who loads them, and of the person to whom they are to be delivered, the place of departure and destination, the names of the master and the ship, and the price of the freight (*e*).

It is obvious that the quality, and frequently also the quantity, of the goods must be unknown to the master; and the commentator (*f*) on the Ordinance informs us, that by the quality the exterior and apparent quality only is meant; and further, that it is usual for the master to insert words, denoting that the quality and quantity are only according to the representation of the merchant; of which practice he approves, and mentions two disputes decided in favour of the master in consequence of this precaution.

[220] 5. Some of the more ancient writers on maritime law, mention the case of goods put on board a ship without the knowledge or consent of the master or owners. It is evident that in such a case no contract for conveyance is made, but nevertheless the master upon delivery of them will be entitled to the usual freight for the voyage.

Having thus considered the several particulars belonging distinctly to the two different species of contract for the conveyance of merchandize by sea, I proceed in the following chapters of this third part, to treat of those general circumstances which may belong to both.

(*e*) Liv. 3. tit. 2. *Des Connoissemens*, art. 2.

(*f*) Valin, ubi supra.

CHAPTER THE THIRD.

OF THE GENERAL DUTIES OF THE MASTER AND OWNERS.

1. IN whatever way the contract for the conveyance of merchandize be made, the master and owners are there by bound to the performance of various duties of a general nature. I propose to treat of these duties in the present chapter, and shall consider them as they regard, FIRST, The preparation for the voyage; SECONDLY, The commencement; THIRDLY, The course; and, LASTLY, The completion of the voyage.

2. And, FIRST, as to the preparation for the [221] voyage.

The first duty is to provide a vessel tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage (*a*). For if the merchant suffer loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, he will be entitled to a recompense. An insufficiency in the furniture of the ship cannot easily be unknown to the master or owners: but in the body there may be latent defects unknown to both. The *French* Ordinance directs, that if the merchant can prove, that the vessel, at the time of sailing, was incapable of performing the voyage, the master shall lose his freight, and pay the merchant his damages and interest (*b*). *Valin*, in his commentary on

(*a*) *Emerigon*, tom. 1. p. 373, 374, 375. *Roccus*, not. 19. 57. 69. Ordinance of *Rotterdam*, 2. *Magens*, p. 101. art. 124. *Molloy*, book 2. ch. 2. sect. 10. *Wellwood's Sea Laws*, tit. 7. p. 22.

(*b*) Liv. 3. tit. 3. *fret.* art. 12.

this article, cites an observation of *Weitson*, "that the "punishment of the master in this case ought not to be "thought too severe, because the master, by the nature "of the contract of affreightment, is necessarily held to "warrant that the ship is good, and perfectly in a con- "dition to perform the voyage in question, under the "penalty of all expences, damages, and interest." And he himself adds that this is so, although before its departure the ship may have been visited according to the practice in *France*, and reported sufficient; because on the visit the exterior parts only of the vessel [222] are surveyed, so that secret faults cannot be discovered, "for which by consequence," says he, "the owner or master remains always responsible; and "this the more justly, because he cannot be ignorant of "the bad state of the ship; but even if he be ignorant, he "must still answer, being necessarily bound to furnish "a ship good and capable of the voyage." *Pothier* (c), taking notice of this article, and of the commentary upon it, declares his own opinion (in conformity, as he observes, to the general principles of law established in his own treatise on the contract of letting to hire) to be, that if the ship has been visited and reported sufficient, the master or owner shall not be answerable for damages occasioned by a defect, which they did not, nor could know; but he agrees that they shall lose their freight.

(c) *Traite de Charte partie*, num. 30. The author here refers to his own excellent *Traite de Louage*, part 2. ch. 1. sect. 4. par. 2. But it rather appears to me that the rules there laid down by himself, warrant the conclusion that in this instance the owner and master ought to be responsible for the loss. "Lorsque le locateur devoit "par sa profession etre informe "du vice de la chose louee, il est "tenu de domage et interets du "conducteur, sans qu'il soit beso- "in de chercher, si effectivement "il en a eu connoissance ou non :" And he instances the cases of a cooper or shopkeeper letting casks made of bad wood.

It may be observed, however, that defects of this sort cannot exist, unless occasioned by the age or particular employment of the ship, or some accidental disaster that may have happened to it; all of which ought to be known to the owner, and ought to lead to an examination of the interior as well as exterior parts.

And indeed this contract, although greatly par- [223] taking of the nature of the contract of letting to hire, is not precisely the same, but includes in itself a warranty beyond that, which is contained in the contract for letting to hire. In a charter-party the person who lets the ship covenants, that it is tight, staunch, and sufficient; if it is not so, the terms of the covenant are not complied with, and the ignorance of a covenantor can never excuse him. And with regard to a general ship, *Chief Justice Holt*, in his elaborate argument on the law of bailments, distinguishes the contract made for the carriage of goods from the contract of letting to hire; and speaking of the former, when made by a person in a public employment, says, "The law charges "the person (*viz.* common carrier, hoyman, master of "a ship) thus entrusted to carry goods, against all "events but acts of God and of the King's enemies;" so that a common carrier is an ensurer against all perils or losses not within the exception (*d*). And the contract of insurance properly so called, is clearly void, if the ship, at the commencement of the voyage, be not seaworthy, although the person who has effected the insurance, be ignorant of that circumstance (*e*). (1)

(*d*) *Coggs v. Bernard*, 2 Lord Raym. 909.

(*e*) *Park* on Insurance, ch. 11.

(1) In Putnam v. Wood. 3 Mass. Rep. 481, the Supreme Court held that, "it is the duty of the owner of a ship when he

Indeed in a case, in which it appeared that the owner of a lighter employed in conveying goods from a quay at *Hull* to sloops in the dock, had together [224] with many other persons engaged in the same business, given public notice, "that they would "not be answerable for any loss or damage, which "should happen to any cargo, which should be put on "board any of their vessels, unless such loss or dam- "age should happen or be occasioned by want of ordi- "nary care and diligence in the master or crew of the "vessel; when and in such case they would pay to the "sufferers 10*l.* per centum upon such loss or damage, "so as the whole amount of such payment should not "exceed the value of the vessel on board whereof such "loss or damage should have happened, and the freight "of such vessel." "And they gave further notice, that

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"charters her or puts her up for freight, to see that she is in a "suitable condition to transport her cargo in safety, and he is "to keep her in that condition, unless prevented by perils of "the seas, or unavoidable accidents. If the goods are lost by "reason of any defect in the vessel, whether latent or visible, "known or unknown, the owner is answerable to the freighter "upon the principle that he tacitly contracts that his vessel "shall be fit for the use, for which he employs her. This prin- "ciple governs not only in charter-parties and policies of in- "surance, but it is equally applicable in contracts of affreight- ment." If therefore during the voyage the vessel meets with an accident, it is the duty of the owner to see that she is put in complete repair at the next convenient port; if he does not he must abide the loss, for it is of the essence of his contract, that his vessel shall be able to receive, retain, and transport her cargo.

"any merchant or other person desirous of having their "goods or merchandizes carried *free of any risk*, in re- "spect of loss or damage, whether the same should "happen from the *act of God or otherwise*, might have "the same so carried by entering into an agreement for "the payment of an *extra freight* proportionable to the "accepted responsibility, on application to them or their "respective agents:" It was held that the owner was answerable to the full extent of the damage done to goods by reason of the leakiness and insufficiency of his lighter, although the merchant was acquainted with the notice before he sent the goods on board. In deliver- ing the judgment of the Court on this occasion, the learn- ed Chief Justice (*Lord Ellenborough*) said, "In every contract for the carriage of goods [225] "between a person holding himself forth as the "owner of a lighter or vessel ready to carry goods for "hire, and the person putting goods on board or em- "ploying his vessel or lighter for that purpose, it is a "term of the contract on the part of the carrier or light- "erman *implied by law*, that his vessel is tight, and fit "for the purpose or employment for which he offers "and holds it forth to the public: it is the very foun- "dation and immediate substratum of the contract that it "is so: the law presumes a promise to that effect on "the part of the carrier without any actual proof; and "every reason of sound policy and public convenience "requires it should be so." And the Court considered the insufficiency of the lighter, "as a personal neglect "of the *owner*, or more properly as a non-performance "on *his* part of what he had undertaken to do, *viz.* to "provide a fit vessel for the purpose;" and thought it clear that the only object of the notice "was to limit

"the responsibility of the owners, in those cases only "where the law would otherwise have made them an- "swer for the neglect of *others*, and for *accidents*, which "it might not be within the scope of ordinary care and "caution to provide against (*e*)." (1)

(*e*) *Lyon & another v. Mells*, 5 East. 428.

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(1) The validity of a notice of this nature in point of law, was not decided in this case. But in a subsequent case, in which the validity of a notice by a common carrier, that "he "would not be accountable for goods of more than 5*l*. value, "(if lost) unless insured and paid for at the time of delivery, "and demanded in one month after such damage had been "sustained," was questioned as contrary to the policy of the common law, which has made common carriers responsible for all losses, except those occasioned "by the act of God, and "the King's enemies," the Court in giving judgment declared that, considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and by water, had prevailed in the kingdom under the observation and with the allowance of courts of justice, and with the sanction also, and countenance of the legislature, which is known to have rejected a bill brought in for the purpose of narrowing the responsibility of carriers in certain cases, on the ground that carriers might limit their responsibility by special contract; and considering that there is no case to be met with in the books, in which the right of a carrier thus to limit his responsibility, has ever been by express decision denied, they could not do otherwise than sustain such right in the present instance, however liable to abuse and productive of inconvenience it might be; leaving to the legislature to remedy the evil when it should be required. Nicholson v. Willan, 5 East. Rep. 507.

And not only must the ship and her furniture be sufficient for the voyage, but she must also be furnished with an adequate number of persons of competent skill and ability to navigate her. And, for sailing down rivers, out of harbours, or through roads, [226] &c. where, either by usage, or the laws of the country, a pilot is required, a pilot must be taken on board (*f*). (1)

3. The manner of taking goods on board, and the commencement of the master's duty in this respect, depend on the custom of the particular place. More or less is to be done by wharfingers and lightermen according to the usage. If the master receive goods at the quay or beach, or send his boat for them, his responsi-

(*f*) *Emerigon*, tom. 1. p. 375. *Molloy*, book 2. ch. 2. sect. 7. *Roccus*, Not. 59. 62. *French* Ordinance, Liv. 2. Tit. 1. *Du Capitaine*. art. 8.

Ordin. of *Wisbuy*, art. 59. 60. - - - - - - - -
Ordin. of *Antwerp*, 2 *Magens*, p. 16. art. 9. - - -
Wellwood's Sea Laws, p. 23. 26. - - - - - - -
Ordin. of *Rotterdam*, 2 *Magens*, p. 103. art. 139. -
Ante, part 2. ch. 5. - - - - - - - - - - - } As to Pilot.

Where a common carrier gives notice to his customers, that he will not be accountable for any parcel of more than 5*l*. value, unless entered as such, and paid for accordingly; if a parcel be sent above that value without being entered and paid for as such, and it be lost, the owner of it cannot recover any thing of the carrier. Izett v. Mountain, 4 East. Rep. 371. See also Lyon v. Mells, 5 East. Rep. 428.

(1) So in Silva v. Low, 1 John. Cas. 184. it was held that a ship must not only be seaworthy, but must be duly equipped and manned with a competent crew engaged for the voyage.

bility commences with the receipt (*g*). In the port of *London*, with respect to goods intended to be sent coastwise, it has been held that the responsibility of the wharfinger ceases by the delivery of them to the *mate* of the vessel upon the wharf (*h*). And as soon as any goods are put on board, the master must provide a sufficient number of persons to protect them (*i*); for, even if the crew be overpowered by a superior force, and [227] the goods stolen, while the ship is in a port or river within the body of a county, the master and owners will be answerable for the loss, although they have been guilty of neither fraud nor fault: the law in this instance holding them responsible from reasons of public policy, and to prevent the combinations that might otherwise be made with thieves and robbers.

It is in all cases the duty of the master to provide ropes, &c. proper for the actual reception of the goods

(*g*) *Molloy*, book 2. ch. 2. sect. 2. *Roccus*, Not. 88. *Wellwood*, tit. 9. *Dig.* 4. 9. 3.

(*h* *Corban & another* v. *Downe*, 5 Espin. N. P. C. 41.

(*i*) *Morse v. Slue*, 1 Vent. 190. 238. Sir T. Raym. 220. *Rich* v. *Kneeland*, Hob. 17. 2 Cro. 330. *Dig.* 4. 9. 1. 1. "Nisi hoc esset statutum, "materia daretur cum furibus adversus eos, quos recipiunt, coeundi, cum ne nunc quidem abstineant hujusmodi fraudibus." But the word *fures* here means *thieves* only, and not *robbers*, who come with a superior and irresistible force; *they* are called *latrones*: Thus by the *Digest*, 17. 2. 52. 3. A partner, who has the care of the joint property, is not answerable, "si id *latrocinio* aut incendio perierit," but he is answerable, "si "a *furibus* subreptum sit:" Upon which *Gothofred* observes, "adversus *latrones* parum prodest "custodia; adversus *fures* prodesse potest, si quis advigilet. *Latrocinium* fatale damnum, seu "casus fortuitus est; at non *furtum*." And the words of the *Digest*, title Nautæ caupones stabularii, &c. 4. 9. 3. are, "nisi si quid "damno fatali contingat; inde Labeo scribit, si quid naufragio, "aut per vim piratarum perierit, "non esse iniquum exceptionem ei "dari; idem erit dicendum si in "stabulo aut in caupona vis major "contigerit." So that our law at present is stricter in the case of carriers, than the civil law; but it is said to have been the same formerly, and not to have charged a carrier in the case of robbery, unless he travelled by dangerous ways, or at unseasonable hours. See *Jones* on *Bailments*, p. 103.

into the ship (*k*). And if a cask be accidentally staved in letting it down into the hold of the ship, the master must answer for the loss (*l*). The ship must also be furnished with proper dunnage (pieces of wood placed against the sides and bottom of the hold) to preserve the cargo from the effects of leakage according to its nature and quality (*m*). And care must be [228] taken by the master (unless by usage or agreement this business is to be performed by persons hired by the merchant) so to stow and arrange the different articles, of which the cargo consists, that they may not be injured by each other or by the motion or leakage of the ship (*n*). And more must not be taken on board, than the ship can conveniently carry, leaving room for her own furniture and the provisions of the crew, and for the proper working of the vessel (*o*). Neither may the master take on board any contraband goods, whereby the ship and other parts of the cargo may be liable to forfeiture or detention (*p*). (1)

(*k*) Laws of *Oleron*, art 10. Laws of *Wisbuy*, art. 22. *Wellwood*, tit. 9.

(*l*) *Goff v. Clinkard*, cited 1 Wils. 282.

(*m*) Ordin. of *Rotterdam*, 2 *Magens*, 101. Art. 125. 126.

(*n*) *Wellwood*, p. 29. Ordin. of *Antwerp*, 2 *Magens*, p. 16. art. 8. *French* Ordinance, liv. 2. tit. *Du Capitaine*, art. 12. Laws of *Wisbuy*, art. 23. Laws of *Oleron*, art. 11. and *Cleirac* thereon.

(*o*) *Roccus*, not. 30. Ordin. of *Rotterdam*, 2 *Magens*, p. 102. art. 127.

(*p*) *Molloy*, book 2. ch. 2. sect. 7. *Roccus*, not. 66. *Wellwood*, tit. 9.

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(1) Admitting that the master should not take on board contraband goods, without the leave of his owner, yet it may be a question how far the owner would be liable to a shipper, when contraband goods were put on board with the owner's consent, and in consequence the innocent goods of a shipper are captured, detained, or condemned. In Seton v. Low, 1 John. Cas. 1, where a policy was underwritten upon *all lawful goods* on board

4. The master must also take on board no false or colourable papers, that may subject the ship to capture

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of a ship, the Court held that contraband goods were lawful goods, and that the fact of such goods being the goods insured, need not be disclosed to the underwriter. *Kent J.* said, " that contraband goods were lawful goods, and that whatever is not prohibited to be exported by the positive law of the country, is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law, contraband trade is prohibited to neutrals, and consequently unlawful. This reasoning is not destitute of force ; but the fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers, and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade ; and yet at the same time from the law of necessity, as Vattel observes, the powers at war have a right to seize and confiscate the contraband goods ; and this they may do from the principle of self defence. The right of the hostile power to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights that may at times reciprocally clash and injure each other. But this collision is the effect of inevitable necessity, and the neutral has no just right to complain. A trade by a neutral in articles contraband of war is therefore a lawful trade, though a trade from necessity, subject to inconvenience and loss." In the case above stated, it may be therefore suggested, that the owner does not impliedly warrant to the shipper an exemption from these accidents of war, or engage that the ship shall have none but innocent goods on board. The same question may be made as to how far a neutral owner, who transports property of a belligerent

or detention (*q*): and he must procure and keep on board all the papers and documents required for the manifestation and protection of the ship [229] and cargo by the law of the countries, from and

(*q*) *Guidon*, chap. 5. art. 33. *Molloy*, book 2. ch. 2. sect. 9. As to the manifest or written contents, required for the importation of goods into *Great Britain* in ships belonging wholly or in part to *British* subjects, and for the importation of wine from foreign parts, see 26 *Geo.* 3. *c.* 40. and 27 *Geo.* 3. *c.* 32. *s.* 11. As to the cocquet and transire, required in *coasting* trade, see 13 and 14 *Car.* 2. *c.* 11. and 32 *Geo.* 3. *c.* 50.*

* See as to the manifest required by the United States in cases of *foreign voyages*, Act of 2. March, 1799, sect. 23. 24. 4. U. S. L. 316. 318.; and in the *coasting trade*, Act of 18 February, 1793, sect. 14. 15. 16. 17. 2 U. S. L. 177 to 182.

erent in his ship, is liable to a shipper of innocent goods, which are captured and detained in consequence thereof.

In Barker v. Blakes, 9 East. 283., the Court of King's Bench held that an insurance on neutral goods, on board of a ship which had enemy's property on board, was valid. The ship bound from New-York to Havre de Grace, and was captured and carried into England. Lord Ellenborough said "the American was at liberty to pursue his commerce with France, and to be a carrier of goods for French subjects; at the risk indeed of having his voyage interrupted by the goods being seized, or of the vessel itself, on board of which they were, being detained or brought into British ports for the purpose of search; but the mere act of carrying such enemies' goods on board his vessel, constituted no violation of neutrality on the part of the American; nor did the arrest and detention of his vessel for the purpose of search and eventual condemnation of the goods, which might be found belonging to the enemy, form any breach of our duty towards the American. The indemnity sought under this policy, is not an indemnity to an enemy or a neutral, forfeiting his neutrality by an act hostilely done by him against

to which the ship is bound, and by the law of nations in general, and treaties between particular states. The rule of the *French* Ordinance on this subject is, that the master must have on board the charter-party and other documents relating to the proof of his lading (*r*). *Valin*

(*r*) Liv. 3. tit. 1. *Charte-parties*, also *Pothier*, Ch.-partie, num. 31. art. 10. and *Valin* thereon. See

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the interests of Great Britain; but an indemnity to a neutral, as such, against the consequences of an act innocently and allowably done by him in the exercise of his own neutral rights; and as innocently and allowably to a certain degree, controlled and interrupted on our part, in the exercise of our rights, as belligerents against enemies' property found on board the ship of a neutral. These rights, though they are in a degree adverse to each other, do not therefore in the exercise of them, necessarily place either party in the situation of an enemy to the other."

Contraband articles found on board a ship are liable to confiscation, but do not affect innocent goods unless belonging to the same owner. The Staadt Embden, 1. Rob. Adm. Rep. 26. And if the ship belong to the same owner, she will be liable to condemnation. The Sarah Christina, 1 Rob. Adm. Rep. 237. The Neutralitet, 3 Rob Adm. Rep. 295. But if the goods be long to a part-owner, only his share of the ship will be condemned. The Jonge, Tobias, 1 Rob. Adm. 329. Articles of a civil or doubtful nature may, from the nature of their destination, become contraband. As if they are bound to a port of naval or military equipment. The Jonge Margaretta, 1 Rob. Adm. Rep. 189. The Neptunus, 3 Rob. Adm. Rep. 80.

So if a ship have contraband goods on board with false papers, or false destination, the ship will be subject to condemnation. The Franklin, 3 Rob. Adm. Rep. 217. S. P. The Edward, 4 Rob. Adm. Rep. 68.

in his commentary on the Ordinance, says that this article relates chiefly to a time of war, and that if a ship should be condemned as good prize on account of the master's failure in this respect, he must answer for the event. I have confined the rule in the manner above expressed, because it would be unjust to charge the master or owners for *some* cases of omission, upon which ships were condemned in *France* during the last war, although the terms of the condemnation were such as to discharge the insurers from their responsibility, according to the established rule of the law of nations, which holds the sentence of a foreign Court to be conclusive of the fact, upon which it is founded; and to which rule the Courts of Justice in this country adhered with the dignity belonging to regular and permanent establishments (1).

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(1) It is absolutely necessary that a ship should be documented according to the laws of the country to which she belongs, according to treaties, and according to the Law of Nations, and that all the documents should be correctly and legally framed; otherwise the owner of the ship, and the freighter will often incur great losses. For where in an action on a policy of insurance a capture was made and a condemnation followed, on the ground of an infraction of the Treaty between the United States of America and France, in not being documented according to that Treaty, the Court held the sentence conclusive against the warranty of the neutrality of the ship. Baring & others v. The Royal Exchange Assurance Company, 5 East. 99. See also the same point, Baring and others v. Claggett, 3 Bos. & Pull. 201, and Lothian & others v. Henderson & others, 3 Bos. & Pull. 499.

Where by the terms of a charter-party a number of days is appointed for the lading of the cargo, either generally and without payment on that particular [230] account by the merchant, or by way of demurrage, the master must not sail before the expiration of the time (1).

5. Secondly, as to the commencement of the voyage.

All things being thus prepared for the commencement of the voyage, the master must forthwith obtain the necessary clearances, or permission to sail, from the officers of the customs, or others, appointed for the dis-

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So in an action on a policy of insurance, it was decided that the plaintiff could not recover, it appearing that the ship was condemned for not having a passport required by the Treaty between the United States and France of February, 1778. That treaty required that the vessels of the allies should be furnished with a passport expressing, inter alia, *the place of habitation* of the Commander of the vessel, which, the Court were of opinion, was not complied with by a passport granting leave to "G. G. D., commander of the ship, called the Mount Vernon, *of the town of Philadelphia*, of the burthen of, &c." such description of place being applicable to the *ship*, as the last antecedent, and not to the *commander*. Baring & others v. Christie, 5 East. Rep. 398.

See also to the same purpose, Silva v. Low, 1 John. Cas. 184., and Goix v. Low, 1 John. Cas. 341.

(1) But it seems he is not bound to wait beyond the time for a cargo, because the owner will not be entitled to demurrage unless specially stipulated. Robertson v. Bethune, 3 John. Rep. 342.

charge of vessels, and pay (*s*) the necessary port and other charges for that purpose, and commence his voyage without delay, as soon as the weather is favourable (*t*). But he must on no account sail out during tempestuous weather (*u*). By most of the ancient marine ordinances, the master is required before he hoists sail to consult his mate, pilot, and others of the crew, as to the wind and weather (*x*), but I apprehend such consultation is not required by the law of *England*, according to which the entire management of the ship is intrusted to the master.

6. If there has been an undertaking or warranty to sail with convoy (*y*), the vessel must [231] repair to the place of rendezvous for that pur-

(*s*) *Guidon*, ch. 5. art. 33. *Molloy*, book 2. ch. 2. sect. 9. Ante, 167.

(*t*) *Ante*, ch. 1. of this part, sect. 12. Ordin. of *Rotterdam*, 2 *Magens*, p. 102. art. 128.

The Ordin. of the *Hanse Towns* allows *two* or *three* days.

(*u*) *Molloy*, book 2. ch. 2. sect. 4. *Roccus*, not 56.

(*x*) *Wellwood*, tit. 8. p. 26. Ordin. of *Antwerp*, 2 *Magens*, p. 17. art. 11. *Emerigon*, tom. i. p. 376. This author also observes, that, although the master is bound on this and other occasions to ask the advice of his crew, yet he is not bound to submit blindly to it, if it is bad, or if under the circumstances it appears to be bad.

(*y*) By *stat.* 38. *Geo.* 3. *chap.* 76. which was made to continue in force until the signing of the preliminaries of peace, (of which the ratification was exchanged between this country and *France* on the 10th of October, 1801), no ship except such as were not required to be registered, or had a license for that purpose from the Lords of the Admiralty, or persons authorized by them, or were proceeding with due diligence from their port of clearance to join convoy, or were bound to or from a port or place in *Ireland*, or from one port or place in *Great Britain* to another, or such as belonged to the *East-India* or *Hudsons-Bay* Company, might sail from any port or place without convoy; and the master was required to use his utmost endeavour to continue with the convoy during the whole, or such part, of the voyage, as they were appointed to protect him, and not separate without leave of the commanding officer. If the master departed without convoy, or wilfully separated from them, he was to forfeit 1000*l.* or in case any part of his cargo consisted of military or naval stores, 1500*l.* (which however might be mitigated to a sum not less than 50*l.* by the Court which tried the cause), to be recovered by a common informer. And the master was to give a bond before he could be allowed to clear outwards, in the penalty of the value of the ship, which was to be for-

pose, and the master must put himself under the protection and control of the ships of war appointed under the authority of the government for the guard of merchant vessels, bound to the place of his destination. A warranty that the vessel shall sail with convoy is very common in a policy of insurance, and in that case, if it be not complied with, the insurance becomes [232] absolutely void, and the insurers are not answerable for a loss happening by tempest, or other accident wholly independent of the subject of the warranty, for which they would otherwise be liable. But if the warranty be made by the master or owner to the merchant, and not complied with, the master or owner may be responsible for a loss happening by tempest or other accident, for which otherwise the master or owner would not be liable. The merchant having trusted to this warranty of the master or owner, and in confidence of its performance made a similar warranty in his contract with the insurers, and having lost the benefit of his insurance by the breach of the warranty on the part of the master and owners, has a right to receive from them the indemnity, which he has lost by their misconduct. This warranty has been so fully and ably treated by *Mr. Park* (*z*), in his valuable book on insurance, that I should forbear to enter upon it here,

feited if he sailed without convoy, or wilfully separated from the convoy without leave of the commander.

By 43 *Geo.* 3. *c.* 160. *s.* 5. the master of a vessel under convoy, who wilfully disobeys the signals or lawful commands of the commander, or deserts the convoy without notice and leave, may be articled against in the Court of Admiralty, at the suit of the Crown, and upon conviction shall be fined at the discretion of the Court in a sum not exceeding 500*l.* and suffer imprisonment for a term not exceeding *one year*.

(*z*) *Park* on insurance, chap. 18. The same subject is also very fully discussed in *Mr. Serjeant Marshall's* excellent treatise on the Law of Insurance, published about the same time as the first edition of this book.

did not a reference to the several decided points and authorities on the subject appear absolutely necessary in this place.

The convoy must be a ship or ships of war appointed under the authority of the government, that is, immediately by the government, or by the commander in chief on a particular station. The protection of a ship of war accidentally bound on the same voy- [233] age, although discharging the office of a convoy, is not a convoy within the meaning of this warranty (*a*).

But this warranty to sail or depart with convoy, does not mean that the vessel shall depart with convoy immediately from the lading port, but only from the place of rendezvous appointed for vessels bound from that port. From many ports, and among others from the port of *London*, no convoy ever sails. It has therefore been held sufficient for a vessel bound from *London* to sail with convoy from the *Downs* (*b*) ; and even from *Spithead*, when there was no convoy appointed at the *Downs* (*c*).

Neither does it require the vessel to sail with convoy bound to the precise place of her destination. But if the vessel sail with the only convoy appointed for vessels going to the place of her destination, it is sufficient. Thus where a policy had been effected on goods on board a ship called the *Little Betsey*, on a voyage at and from *London* to *Saint Sebastian* in *Spain*, warranted to depart with convoy for the voyage, and at the trial of an action brought against the underwriters it appeared that no convoy was appointed directly to *Saint Sebastian*, but

(*a*) *Hibbert v. Pigou* Park on Insurance, chap. 18. p 339.
(*b*) *Lethulier's* case, 2 Salk. 443.
(*c*) *Gordon v. Morley*, 2 Stra. 1265.

that the *Little Betsey* sailed under convoy of a squadron of frigates, the commander of which had [234] orders from the Admiralty to take with him the *Weazle* and another frigate and proceed to *Gibraltar*, and to take with him such ships as should be at *Spithead* bound to *Bilboa* (which is very near and in the course to *Saint Sebastian*), and to detach the *Weazle* with the latter with orders to see them safe to *Bilboa*; and on the voyage the commodore made a signal for the *Weazle* to part company, and take with her such ships as were bound to *Bilboa* and *Saint Sebastian*, in obedience to which the *Weazle* parted company, and took with her the *Little Betsey* and other ships bound for *Bilboa* and *Saint Sebastian*, but soon after parted with them in chase of a strange ship, and did not afterwards join them; a jury of merchants, to whom *Chief Justice Eyre* left the question, determined this to be a sailing with convoy according to the meaning of the warranty, and the Court of Common Pleas afterwards approved of the verdict (*d*).

In the case just quoted, the convoy under which the vessel sailed, was in effect the convoy for the whole voyage, although not intended actually for *Saint Sebastian*. It sometimes happens that the force first appointed is to accompany the ships only for a part of their voyage, and to be succeeded by another; at other times a small force is detached from the main body to bring them up to a particular point: if a vessel sail [235] under the protection of the force thus appointed (*e*), or detached (*f*), the warranty is satisfied.

(*d*) *D'Eguino v. Bewicke*, 2 Hen. Black. 551.

(*e*) *Smith v. Readshaw*, Park, ch. 18. p. 349. *De Garay v. Claget*, ibid.

(*f*) *Manning v. Gist*, Marshall, book 1. ch. 8. sect. 4. *Audley v. Duff*, 2 Bos. & Pul. 111.

But this warranty requires not only that the vessel shall commence the voyage under the protection of the convoy, but also that she shall continue during its course under the same protection (*g*), unless prevented from so doing by tempest or other unavoidable accident, in which cases the master and owners will be excused, if the master does all that is in his power to keep the benefit of the convoy (*h*).

Neither is it sufficient for the master to sail in company with the ships of war appointed as the convoy, but he must before the departure obtain, or at least use all due diligence to obtain, the sailing instructions and orders delivered out by the commander of the convoy to the masters of the trading vessels, that are to sail under his protection. The necessity of obtaining such orders, if possible, is fully established by the two cases *Webb v. Thomson* (*i*), and *Anderson v. Pitcher*, in the Court of Common Pleas (*k*); in the last of which *Lord Eldon* observes, "It being once decided, that a convoy with-
"in the terms of the policy, means a convoy appointed
"by government, it seems to follow of necessity that
"the ship must depart with sailing instructions,
"if by the due diligence of the master they can [236]
"be obtained. The value of a convoy appoint-
"ed by government in a great measure arises from its
"taking the ships under control as well as under pro-
"tection. But that control does not commence until
"sailing instructions have been obtained; nor can it be
"enforced otherwise than by their means. Indeed the
"reason of that rule, which requires that the convoy

(*g*) *Lilly v. Ewer*, Doug. 72.
(*h*) *Jeffrey v. Legendra*, Carth. 216. 3 Lev. 320.
(*i*) *Webb v. Thomson*, 1 Bos. & Pull. 5.
(*k*) *Anderson v. Pitcher & Wife*, 2 Bos. & Pull. 164.

"should be appointed by government, shews the ne-
"cessity of having sailing instructions; since without
"them the ship does not stand in that relation, or under
"those circumstances, in which she can take the full
"benefit of the government convoy. If the fleet be
"dispersed by a storm, how is she to learn the place of
"rendezvous? If it be attacked by the enemy, how is
"she to obey signals? In short, what communication
"can the protected have with the protecting force? It
"has been contended, that if she be under the protection
"of the guns, it is sufficient. But will it be contended
"that, provided she be under the protection of the guns
"at her departure, though sailing instructions be never
"obtained during the voyage, or not till the last day of
"the voyage, the warranty is complied with? Either
"sailing instructions are not necessary, or, if they be
"necessary, they must be so at some given period, and
"can only be dispensed with in some particular cases.
"Then can any other period be assigned but the begin-
"ning of the voyage?"

Each of these two cases arose from the loss
[237] of the same vessel, the *Golden Grove*, which had been insured at and from *London* to the *West-Indies*, with leave to go to the place of rendezvous to join convoy, and warranted to sail from thence with convoy for the voyage; and in the last of them, in which the facts are most fully stated, it appeared that the ship arrived at *Spithead* about *nine* o'clock in the morning of the 15th *November* 1795; that she came round under the care of the first mate, the captain himself being on shore at *Portsmouth;* that on the preceding day (the 14th) sailing instructions were delivered at *Portsmouth* to all such ships, as applied regularly for them; and

that the captain of the *Golden Grove*, previous to her arrival, made enquiry concerning sailing instructions, but found that they could not be obtained until the ship was actually in sight; that on the 15th of *November*, by day-light, admiral *Sir H. C. Christian*, the commander of the convoy, got under weigh, but had not entirely quitted the roadstead until about *four* o'clock in the evening: and when he got under sail, he left the *Trident* frigate to bring up such vessels as did not weigh anchor with him; that about *one* o'clock of the same day the captain of the *Golden Grove* repaired on board, and got under weigh, at which time the *Trident* had also got under weigh, and both the admiral's ship and the *Trident* had then proceeded so far, that it was clear the *Golden Grove* could not overtake the former soon enough for the captain to go on board that night, and it was even doubtful whether he could overtake the latter.

That on the next day, between *ten* and *twelve* [238] o'clock in the forenoon, the captain of the *Golden Grove*, being only a quarter of a mile from the admiral's ship, went on board her, and obtained sailing instructions: that soon afterwards the *Golden Grove* was lost having been from the time of her departure to that of the loss under the protection of the convoy. Upon this state of facts, it was held, that the warranty was not complied with; for either the ship had not arrived time enough to obtain sailing instructions, or, if she had arrived time enough, her captain had not used the necessary endeavours to obtain them before she sailed.

On the other hand, if the master do all in his power to obtain sailing instructions, but is prevented from ob-

taining them by the badness of the weather (*l*); or if they are refused by the commander of the convoy (*m*); the warranty is complied with (*n*).

[239] 7. THIRDLY, as to the course of the voyage. Having commenced his voyage, the master must proceed to the place of destination without delay and without stopping at any intermediate port, or deviating from the straight and shortest course, unless such stopping or deviation be necessary to repair the ship from the effects of accident or tempest, or to avoid enemies or pirates, by whom he has good reason to suspect that he shall be attacked, if he proceeds in the ordinary track, and whom he has good reason to hope that he may escape by delay or deviation; or unless the ship sail to the places resorted to in long voyages for a supply of water or provisions by common and established usage (*o*). (1) And if the ship has the misfor-

(*l*) *Victorin v. Cleeve*, 2 Stra. 1250. The cause was tried before *Chief Justice Lee* at Guildhall.

(*m*) *Veedon v. Wilmot*, by *Ch. Jus. Lee*, at Guildhall. *Park*, ch. 18. p. 341. *notis*.

(*n*) A very full account of the regulations made at different times in *France*, on the subject of convoy, is given in *Valin's* Commentary on the *French Ordinance, tom.* i, p. 691. by which it appears that at particular periods merchant ships have been absolutely forbidden to sail without convoy, under very severe penalties on the master and owners: and that, whenever convoy was required, the master was to bring his ship to the rendezvous and receive sailing instructions (*ordres pour la route*) from the commandant, and obey his orders, and not separate from him. The Ordinance of *Hamburgh*, of the year 1731, tit. 4. art. 4. requires the master to receive a letter of instructions from the commander of the convoy, 2 *Magens*, 214.

(*o*) *Roccus de assec.* not. 52. see *Park* on Insurance, chap. 17. of Deviation. *French* Ordinance, liv. 3. tit. 3. *Dufret.* art. 10.

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(1) As to what will amount to a ratification of a deviation by the master, and a waiver of the right to damages, on the part of the owner, see the case of Codwise v. Hacker, 1 Caine's New-York Rep. 526. See also Thurston v. The Columbia Insur.

tune to meet with enemies or pirates, the master must perform the part of a valiant man, and make the best resistance which the comparative strength of his ship and crew will allow (*p*).

By the treatise called the *Guidon*, it is declared, that if the master, by connivance with robbers, or by his entreaties, obtains from them any part of the cargo by way of payment of his freight, he shall restore such part to the merchant receiving the freight due in respect of it. And if the robbers pay him the freight of his ship, he shall give an account of the money paid, and the money shall be distributed by way of general average between the goods stolen and the [240] freight of the ship (*q*). I have already men-

(*p*) Ordinance of the *Hanse-Towns*, art. 35, 36, 37. *Roccus*, not. 70. *Ante*, part. 2. ch. 4. sect. 10.

(*q*) *Guidon*, chap. 6. art. 2. p. 229.

Company, 3 Caine's New-York Rep. 89, cited ante p. 167. as to what deviation will not amount barratry.

Under an authority to go from New-York to Barbadoes and a market, the master has authority to go *bona fide* from Island to Island in the West Indies, until he has sold the whole of his cargo. He may sell a part at one port and a part at another, until the whole is disposed of. So decided in favour of an owner on a policy of insurance, in Maxwell v. Robinson, &c. 1 John. Rep. 333.

It seems that a stopping to relieve a ship in distress is not a deviation, and will not discharge an underwriter; for if it would, no master would be justified in using an exertion to save a vessel in the most imminent danger of perishing. Per Marshall, C. J. in Mason v. Ship Blaireau, 2 Cranch. Rep. 257. note.

tioned the provisions of the *English* legislature on this subject (*r*).

If the ship be driven into a port out of the course of the voyage by tempest, or the master sail thither for any of the before mentioned reasons, he must wait no longer than necessity requires, but sail again without delay; and for that purpose supply his ship with the requisite necessaries or repairs as expeditiously as he can (1).

(*r*) *Ante*, part 2. ch. 4. sect. 10.

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(1) In such a case it seems the ship may receive goods on board on freight, at the port of necessity, if it may be done without deviation or delay, or otherwise increasing the risk of the insurers. Therefore in Raine v. Bell, 9 East. 195. where a ship and freight were insured from her port of loading in Spain to London, with liberty to *touch* and *stay* at any port or place whatever, and the ship was obliged, in consequence of want of provisions, to put into Gibraltar, and while she lay there the master took on board some chests of dollars on freight, but the voyage appeared not to have been delayed thereby, and the ship was afterwards lost on her homeward voyage. The Court held that the trading at Gibraltar did not avoid this policy. Lord Ellenborough said, that " he reserved giving any opinion as to the operation of a change of cargo in the case of a policy on goods; because the taking in other goods in the course of one entire voyage, where it is not provided for, may be contended to constitute a different adventure from that on which the ship started with her original cargo." In Stitt v. Wardell, 2 Esp. N. P. C. 610. Lord Kenyon held that under a policy on a ship, " with liberty to touch and stay at any port or ports without prejudice," the insured has no right to break bulk in any port, to which the ship is driven by necessity; if he does, the policy is void. And in Sheriff v. Potts, 5 Esp. N. P. C. on

8. If by reason of the damage done to the ship, or through want of necessary materials, she cannot be repaired at all, or not without very great loss of time, the master is *at liberty* to procure another ship to transport the cargo to the place of destination (*s*). But if his own ship can be repaired, he is not *bound* to send the cargo by another, but may detain it till the repairs are made, and even hypothecate it for the expense of them: that is, supposing it not to be of a perishable nature; if it be of such a nature, he ought either to tranship or sell it, according as the one or the other will be most beneficial to the merchant (*t*). So if the ship has been wrecked, and the cargo saved. And if on the [241] high seas, the ship be in imminent danger of sinking, and another ship apparently of *sufficient ability*

(*s*) Laws of *Oleron*, art. 4. and *Cleirac* thereon. *French Ordinance*, liv. 3. tit. 3. *Fret*. art. 11. and *Valin* thereon. *Molloy*, book. 2. chap. 4. sect. 5. Ordin. of *Antwerp*, 2. *Magens*, p. 14. art. 3. Ordin. of *Rotterdam*, 2 *Magens*, p. 104. art. 147, 148. *See* also the judgment deliveredby *Lord Mansfield* in the case of *Luke v. Lyde*, 2 Burr. 889.

(*t*) See the judgment pronounced by *Sir W. Scott*, in the case of the GRATITUDINE, *Mazzola*, 3 Rob. A. R. p. 240. *cited*, ante, part 2. ch. 3. sect. 29.

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a policy on a ship at and from Guernsey to Gibraltar, with liberty to touch and discharge goods at Lisbon, Lord Ellenborough was of opinion that this did not authorize the insured to take in cargo at Lisbon; for the liberty was to discharge her cargo only; and the taking in the cargo at Lisbon was a new adventure; and further, that a clause in the policy to return premium if the ship sailed from Lisbon with convoy, did not help the case. But Lawrence J. in the above case, in 9 East, doubted the authority of Stitt v. Wardell. But all the Court held that nothing would justify the taking in any cargo in the course of the voyage, which would enhance the risk of the underwriter.

be passing by, the master may remove the cargo into such ship, and although his own ship happen to outlive the storm, and the other perish with the cargo, he will not be answerable for the loss (1).

9. Moreover the master must during the voyage take all possible care of the cargo (*u*), and although he is not responsible for injury done to it in consequence of a leak in the ship occasioned by tempest or other accident; yet where rats occasioned a leak in the vessel, whereby the goods were spoiled, the master was held responsible for the damage, notwithstanding the crew afterwards by pumping, &c. did all they could to preserve the cargo from injury (*v*). And this determination agrees with the rule laid down by *Roccus*, who says, if mice eat the cargo, and thereby occasion no small injury to the merchant, the master must make good the loss, because he is guilty of a fault. Yet if he had cats on board his ship,

(*u*) *Emerigon*, tom. i. p. 377. (*v*) *Dale v. Hall*, 1 Wils. 281.

(1) But the master has no general authority to sell the cargo where the ship is disabled from completing her voyage. And though he obtain an order of a Vice-Admiralty Court for a sale, it will still be considered a tortious act in him. Therefore where a ship bound from Honduras to London, was captured and recaptured, and was wrecked at St. Kitts, where she was carried by the recaptors, and a sale of the cargo was directed by the Vice-Admiralty Court there *on the application of the master*, acting *bona fide* for the benefit of all concerned, but without any orders from any, the Court held the sale tortious. Hunter v. Prinsep, 10 East. 378.

he shall be excused (*w*). This rule and the exception to it, although bearing somewhat of a [242] ludicrous air, furnish a good illustration of the general principle, by which the master and owners are held responsible for every injury, that might have been prevented by human foresight or care. In conformity to which principle they are responsible for goods stolen or embezzled on board the ship by the crew or other persons (*x*), or lost or injured in consequence of the ship sailing in fair weather against a rock or shallow known to expert mariners (*y*).

So where in a voyage from *Hull* to *Gainsborough* a vessel was sunk in the river *Trent* by striking against the anchor of another, which anchor lay under water, and without a buoy, whereby some goods in the former were injured, the owners thereof were held responsible for the injury (*z*).

10. If the master, being compelled to take refuge in a foreign port during the course of his voyage, has occasion for money for the repairs of the ship, or other expense necessary to enable him to prosecute and complete the voyage, and cannot otherwise conveniently obtain it, he may either hypothecate the whole cargo or sell a part of it for this purpose (*a*); in the latter case, if the ship reach the place of destination, the merchant will be entitled to receive the clear [243] value, for which the goods might have been sold

(*w*) *Roccus*, not. 58. and see *Jones* on Bailments, p. 105. This rule is laid down in the *Consolato del mare*, cap. 65 and 66. and adopted by all foreign writers on this subject. *Emerigon* tom. i. p. 377, 378.

(*x*) *Roccus*, not. 40. *Wellwood*, tit. 9. p. 30.

(*y*) *Emerigon*, tom. 1. p. 373. *Roccus*, not. 55. *post*, 256. *sect.* 6.

(*z*) *Proprietors of the Trent and Mersey Navigation v. Wood*, East. Ter. 1785. in K. B. Post, 256. *sect.* 5.

(*a*) The GRATITUDINE, *Mazzola*, 3 Rob. A. R. 240. cited ante, part 2. ch. 3. sect. 29.

at that place (*b*); if the ship afterwards perish, and reach not the destined port, the Ordinance of *Wisbuy* expressly declares that the money raised by this sale shall be paid to the merchant by the master (*c*); and *Cleirac*, *Kurick*, *Valin*, and *Pothier*, agree in opinion that the money is in such a case due not only from the master, but also from the owners, because it was expended for a purpose, of which they were at all events liable to sustain the charge. But none of the other Ordinances contain such a provision; and *Emerigon* contends on the authority of the *Consolato del mare*, and of the Ordinances of *Oleron* and *Antwerp*, that the money is only payable in case of the safe arrival of the ship; which was the opinion also of several persons, whom *Pothier* consulted. And this doctrine seems the most reasonable, as the merchant is not thereby placed in a worse situation than if his goods had not been sold, but had remained on board the ship. I cannot find that the question ever arose in this country (1).

(*b*) *Alers & others, v. Tobin & others* at Guildhall, *October* 30, 1802. Before *Lord Ellenborough*, Ch. J. and a special jury. Laws of *Oleron*, art. 22. Ordin. of *Wisbuy*, art. 35. 45. 69. *French* Ordinance, liv. 2. tit. 1. *du Capitaine*, art. 19. liv. 3. tit. 3. *Fret.* art. 14. and *Valin* thereon. *Pothier*, Ch. Partie, num. 33. 34. *See* also *Molloy*, book 2. chap. 2. sect. 14. And Ordin. of *Rotterdam*, art. 133, 134, 135. 2. *Magens*. 102, 103.

(*c*) Art. 68. See *Emerigon*, tom. 2. p. 445. where the several authorities here referred to are cited.

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(1) In case of a capture during the voyage, the duty of the master does not cease. He ought to contribute his exertions to rescue the property from condemnation, by interposing a claim and exhibiting in support of it, the documents with which he has been furnished, for the protection of the cargo. If by negligence in the performance of this duty the proprietor of the goods sustain damage, the master is and ought to be responsible

11. Lastly,—As to the completion of the voyage. When the ship has arrived at the place of her destination, the master must take care that she be [244] safely moored or anchored (*d*), and without delay deliver the cargo to the merchant or his consignees (*e*), upon production of the bills of lading and payment of the freight and other charges due in respect of it: and if by the terms of the charter-party, a particular number of days is stipulated for the delivery, either generally or by way of demurrage, he must wait the appointed time for that purpose. These charges are in ordinary cases primage, and the usual petty average, as expressed

(*d*) Ord. of *Wisbuy*, art. 36.

(*e*) This is true as a general rule; the exceptions to the rule, arising out of the power of the consignor to countermand the delivery, and stop the goods, before they come to the possession of the consignee will be treated of distinctly in the *ninth* chapter of this part.

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to the extent of the amount of the damage. But if he be not guilty of negligence, and act with good faith, he shall be protected even though the condemnation of goods shall appear to have been made in consequence of a mistake made by him in his answer to admiralty interrogatories. Therefore in an action against the master for damages for loss of cochineal, where it appeared that the ship was a general ship, bound from New-Orleans to New-York, and the plaintiff had shipped the cochineal on board her, and the defendant had signed bills of lading for it, one of which he kept with the customary proofs of neutral property, and the ship, during the voyage, was captured by the British, and the captors took away all the papers relative to the ship and cargo, and libelled her in the admiralty, as Spanish property. That the master put in an answer and claim under oath, and in it, and in answer to the interrogatories, stated that he had not signed any bill of lading for the cochineal, and did not know to whom it belonged, but it was to be paid for by,

in the bill of lading; in case of any loss, that became the subject of general average, the Civil Law imposed upon the master the duty of adjusting and settling such average, and obtaining from the owners of the cargo saved, the sums to be paid as a contribution to the loss, and allowed him to detain the cargo for that purpose (*f*). This power of detaining the cargo is also given by the laws of *Oleron* (*g*), and by the *French* Ordinance (*h*). It is said to be the practice in this country, in the case of a general ship, for the master to take security from

(*f*) *Dig.* 14. 2. 2.
(*g*) Art. 9.
(*h*) Liv. 3. tit. 8. *du jet.* art. 21.

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and delivered to, a passenger. That the cochineal was condemned though the ship and the greater part of the cargo was cleared as neutral property. The Judge who tried the cause, left it to the Jury to say whether the master had been guilty of any fraudulent intent or not. If so, then they should find for the plaintiff: but if they were of opinion that the loss had happened through mere forgetfulness,mistake,or unintentional default on his part, they ought to find for the defendant. The Jury found for the defendant, and on a motion for a new trial, the Court were of opinion that the direction was right, and that the master might have forgotten that he had signed the bill of lading, and his answer did not justify the condemnation. The jury had, by their verdict, established that he acted with good faith, and that no fraud or negligence was imputable to him. Cheviot v. Brooks, 1 John. New-York Rep. 364. And the duty of a master to his owners does not oblige him to violate the good faith, *even of an enemy*, in order to preserve his ship, nor to employ fraud in order to effect that object. Hannay v. Eve, 3 Cranch. Rep. 243.

the merchants, before he delivers the goods, for payment of their shares of this contribution [245] when the average shall be adjusted (*i*).

The cargo (as I have before observed) is bound to the ship, as well as the ship to the cargo (*k*); and therefore (unless there is a stipulation to the contrary) the master is not bound absolutely to part with the possession of any part of his cargo, until the freight and other charges, due in respect of such part, are paid. *Valin* informs us that the entire contents of a single bill of lading are to be considered as one part, although consisting of very different articles, but that the contents of one bill of lading are not bound to the payment due for the contents of another bill of lading, although consigned to the same person (*l*). In this country however it has been held, that the master may detain any part of the merchandize for the freight of all that is consigned to the same person (*m*): which seems to be a more reasonable and convenient rule. The master however cannot detain the goods on board the ship, until these payments are made, as the merchant would then have no opportunity of examining their condition. By the Ordinance of *Wisbuy* (*n*), and also by the *French* Ordinance (*o*), the master may seize and detain [246] the goods in the lighters or barges, which are to transport them to the quay, and by the former he

(*i*) So deposed by a gentleman very conversant with this business, in the cause of *Myer & others v. Vander Deyl*, Guildhall, Sit. p. Mic. Ter. 1803. before *Lord Ellenborough*. C. J.

(*k*) *Roccus*, Not. 88. Ordinance of *Rotterdam*, 2 *Magens*, p. 106. art. 156, 157. See ch. 1. of this part, sect. 7.

(*l*) *Valin*. on the *French Ordinance*, tom. 1. p. 668.

(*m*) *Soldergreen v. Flight & another*, Guildhall, Sit. p. T. T. 1796, before *Lord Kenyon*, C. J. 6 East. Rep. 622. cited, and note p. 246.

(*n*) Art. 57.

(*o*) Liv. 3. tit. 3. *Fret.* art. 23.

may detain the lighters by the ship's side. *Cleirac* (*p*), in his commentary on the laws of *Oleron*, says that the same power is given by the Ordinance of *Philip the Second*, and by the *Consolato del mare*, and that the latter allows him to detain goods equal in value to four times the amount of the freight. The Ordinance of *Rotterdam* allows the master to detain the goods for his freight, but requires him to unload and take care of them, that they may not be diminished or spoiled (*q*). In England the practice is to send the goods to a wharf, and order the wharfinger not to part with them, till the freight and other charges are paid, if the master is doubtful of the payment. And by the law of England, if the master once parts with the possession out of the hands of himself and his agents, he loses his lien or hold upon the goods, and cannot afterwards reclaim them (*r*). (1)

(*p*) Art. 21. note. 3. page 72.

(*q*) Art. 157, 158. 2 *Magens*, 106.

(*r*) By the *French Ordinance*, liv. 3. tit. 3. *fret.* art. 24. The lien or privilege continues while the goods are on board the ship, in the lighters, or on the quay, and even for a fortnight after they have been delivered, provided they have not in the mean time passed into the hands of a third person.

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(1) So if the master make a delivery of part of the goods to the consignee, he may retain the residue, even against a purchaser, until payment is made of the freight of the whole: but if the goods are sold to different persons by the consignee and part delivered, the master cannot have a lien upon the residue, so as to compel one of the purchasers to pay freight for what had been delivered to another; but only for what had been purchased by himself. This was decided in an action brought by the plaintiff to recover freight of 1750 barrels of tar, under the following circumstances. The tar had been shipped on board the plaintiff's ship for London, consigned to one Hippius, who

12. The manner of delivering the goods and consequently the period, at which the responsibility of the master and owners will cease, depend upon the custom of particular places, and the usage of [247] particular trades (*s*). Thus a hoyman who brings goods from an out-port into the port of *London*, is not

(*s*) See *Vaün* on the French Ordinance, tom. 1. p. 530.

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held bills of lading for the same. Before the arrival of the ship, Hippius sold all the tar to the defendants, who paid for the same, including freight and duty by their acceptances, which freight and duty were to be paid for by Hippius, and the bills of lading were indorsed to the defendants. The ship arrived, and was reported and entered by Hippius, and 721 barrels of the tar delivered to the defendants when Hippius stopped payment. The master refused to deliver the residue of the tar, unless the defendants would pay the freight due for the whole 1750 barrels, which they refused to do. On the trial the plaintiff had a verdict for the whole freight by the opinion of Lord Kenyon, who held the doctrine above-mentioned. Sodergreen v. Flight & another, cited in Hanson & another v. Meyer, 6 East. Rep. 622. cited in Abbot, 245. note (m).

The master of a ship who has contracted debts on account of the ship, has a lien upon the goods and freight to the amount of such debts; and the consignees of the cargo, after notice to this effect, cannot pay the freight to the owner without the consent of the master; and if they do, will be liable to refund so much as the extent of these debts. White v. Baring & another, 4 Esp. N. P. Cas. 22.

A hostile embargo under which possession of the goods is taken by government, defeats the lien of the master upon the goods. Therefore where a Danish vessel having brought a cargo of fruit from Spain, imported by the order of Burnett &

discharged by landing them at the usual wharf, but is bound to take care and send them out by land to the place of consignment (*t*). And if the consignee require to have the goods delivered to himself, and direct the master not to land them on a wharf at *London*, the mas-

(*t*) *Wardell v. Mourillyan*, 2 Espin. N. P. cases, 603.

Co. and consigned to them, and by them sold to one Wolff, under a previous contract, was detained under the Danish embargo, in consequence of which it could not be delivered without an application to the Court of admiralty; an order of council passed by which property in this situation might be delivered on giving stipulations to abide the eventual adjudication, and also an order on the same day forbidding payment of any bill to any persons, whose property was under embargo, and also the payment of freight for merchandize imported in embargoed vessels. Wolff obtained possession of the goods on giving a stipulation. Burnett & Co. paid 60*l.* in part of the freight and then became insolvent, and now the master sought payment of the freight yet due from Wolff. Sir W. Scott held that the embargo, on all Danish vessels, was a measure taken in contemplation of hostilities, and must be considered as discharging the lien which the master had upon the goods. In the situation in which the two countries stood, the master had no right to make his demand against any subject of this country, being himself under detention as well as the vessel on whose behalf the demand arose. The effect of this situation must be to defeat the right, which the master had possessed over his property, as a lien, entitling him to retain possession till his freight should be paid. The consequence is, that his real security being defeated by accident, partaking of the nature of hostilities, he must be remitted to his personal security against the persons with whom he contracted. The Theresa Bonita. 4 Rob. Adm. Rep. 236.

ter must obey the request; for the wharfinger has no legal right to insist upon the goods being landed at his wharf, although the vessel be moored against it (*u*). But in the case of ships coming from a foreign country, delivery at a wharf in *London* discharges the master (*x*). If the consignee send a lighter to fetch the goods, it seems the master of the ship is obliged by the custom of the river *Thames* to watch them in the lighter, until the lighter is fully laden; and he cannot discharge himself from this obligation by declaring to the lighterman that he has not hands to guard the lighter, unless the consignee consent to release him from the performance of it (*y*): But it has been much contested whether the master is by the usage bound to take care of the lighter after it is fully laden, until the time when it can be properly removed from the ship to the wharf; [248] at a late trial on this question, it was held that the master was not obliged to do this (*z*). In the case of ships coming from *Turkey*, and obliged to perform quarantine before their entry into the port of *London*, it is usual for the consignee to send down persons at his own expence, to pack and take care of the goods; and therefore where a consignee had omitted to do so, and goods were damaged by being sent loose to shore; it

(*u*) *Syeds v. Hay*, 4 Ter. Rep. K. B. 260.

(*x*) By *Buller, J.* Arguendo in the case of *Ilyde v. Trent & Mersey Navig. Comp.* 5 Ter. Rep. K. B. 397.

(*y*) *Catley & another v. Wintringham*, Peake's N. P. cases, 150.

(*z*) *Robinson v. Turpin & another*, Guildhall, Sit. after T. T. 1805. before *Lord Ellenborough*, Ch. J. This was an action by the owner of the goods against the Lighterman, and the plaintiff obtained a verdict. At a former trial before *Sir James Mansfield*, Ch. J. the plaintiff had been nonsuited.

was held that he had no right to call upon the master of the ship for a compensation (*p*). (1)

(*p*) *Dunnage v. Jolliffe*, before *Lord Kenyon*, Ch. J. at Guildhall. Sit. p. Mich. T. 1789.

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(1) If the goods are on the arrival of the ship put on board of a lighter hired in the usual way, and the owner of them takes the custody of them before they are landed, the master is discharged. Therefore in an action on a policy of insurance, on a cargo of fish until safely landed, where it appeared that on the arrival of the ship at London, the goods insured were put on board a lighter hired in the usual way, and brought in the afternoon to a wharf belonging to the plaintiff, but in consequence of the roughness of the weather, could not be landed that evening, and the plaintiff told the lighterman that he need not stay to see the goods landed, for he, the plaintiff, would look to the landing himself; accordingly the lighterman left the cargo along side the wharf, and in the course of the night the lighter sunk without any neglect in any one ; the Court held that the plaintiff had taken the goods into his possession, and was not entitled to recover. Strong v. Natally, 1 New Rep. 16.

CHAPTER THE FOURTH.

OF THE CAUSES, WHICH EXCUSE THE MASTER AND OWNERS.

1. IT has been already intimated (*a*) that a carrier is in general excused for a non-performance of the contract on his part, occasioned by any event falling within the meaning of the expression *act of* [249] *God and the King's enemies.* The expression *act of God* denotes natural accidents, such as lightning, earthquake, and tempest; and not accidents arising from the fault or negligence of man (*b*); for which it has been already shewn that the master and owners, like other common carriers, are sometimes answerable, although no actual blame may be imputable to them; for in considering whether they, or other carriers, are chargeable for any particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which either according to the general rules of law, or the particular contract of the parties, afford an excuse for the non-performance of the contract.

(*a*) In the preceding chapter, sect. 2.

In the preamble to the *statute*, 26 *Geo.* 3. *c.* 86. the cases, in which the master and owners are exempted from responsibility, are expressed to be *accidents by the King's enemies, the perils of the sea, or the act of God.*

(*b*) *Trent & Mersey Navigation Company v. Wood*, East. Term, 23 *Geo.* 3. in K. B. *Forward v. Pittard*, 1 Ter. Rep. K. B. 27.

Thus in an action (c) brought against the master of a vessel navigating the rivers *Ouse* and *Humber* [250] from *Selby* to *Hull*, by a person whose goods had been wet and spoiled; at the trial whereof it appeared in evidence, that at the entrance of the harbour at *Hull* there was a bank, on which vessels used to lie in safety, but of which a part had been swept away by a great flood some short time before the misfortune in question, so that it had become perfectly steep instead of shelving towards the river; that a few days after this flood a vessel sunk by getting on this bank, and her mast, which was carried away, was suffered to float in the riv-

(c) *Smith v. Shepherd.* This cause was first tried at the summer assizes for Yorkshire, 1795, and the plaintiff non-suited; the judge being of opinion that no case of negligence was proved. The non-suit was set aside by the court of King's Bench, and a new trial granted, that the facts might be more fully inquired into. It was tried a *second* time at the lent assizes following. The account in the text is of the evidence given at the *second* trial, which differed in some particulars from that given at the *first* trial. In Easter term following, a new trial was moved for, but a rule to shew cause refused.

Several ship owners, being greatly alarmed at the decision of this cause, petitioned Parliament for an alteration of the law on this subject: and a bill passed the *House of Commons*, enacting that no owner or master of any ships or vessels, employed *in the navigation of the high seas*, should be subject to answer for any loss or damage, which should happen to any goods on board by any accident whatever, unless the same should happen or arise "by or through the robbery, "embezzlement, secreting, or ma-"king away with, or by or through "the actual default, of the said "owner or owners, master, mari-"ners, or other person or persons "employed in and on board of such "ships or vessels; any law, usage, "or custom to the contrary there-"of in anywise notwithstanding." And that no owner or master of any ship or vessel employed *in the navigation of the tideway of any river*, and not employed in the navigation of the high seas, should be subject to answer for any loss or damage which should "happen or arise at "or below any port or place in "such tideway, where ships or "vessels employed in the coasting "trade, do or shall load or dis-"charge by entry or sufferance;" to any goods on board, unless such loss or damage should happen or arise in the ways before-mentioned with respect to ships navigating the high seas.

But this Bill was rejected by the *House of Lords*.

This led to the alteration of the bill of lading mentioned before, part iii. chap. 2. sect. 3. and, I presume, also to the notice mentioned to have been given in the case of *Ellis v. Turner & another*, part ii. chap. 2. sect. 6.

er tied to some part of the vessel: and that the defendant upon sailing into the harbour struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck and would have remained safe, had the bank been in [251] its former situation, but on the tide ebbing her stern sunk into the water, and the goods were spoiled; upon which the defendant tendered evidence to shew that there had been no actual negligence: *Mr. Justice Heath*, before whom the cause was tried, rejected the evidence; and he further ruled that the act of God, which could excuse the defendant, must be *immediate;* but that this was too remote; and directed the jury to find their verdict for the plaintiff; and they accordingly did so. The case was afterwards submitted to the consideration of the Court of King's Bench, who approved of the direction given by the learned judge at the trial, and the plaintiff succeeded in the cause. There does not appear to have existed in this case any bill of lading or other instrument of contract; and the question therefore depended upon general principles, and not upon the meaning of any particular words, or exception.

The only exception formerly made in the common bill of lading was of the *perils of the sea*, which words certainly denote the *natural* accidents peculiar to that element, and in no more than one instance have been held to extend to an event not attributable to natural causes. The several words lately introduced into the exception of the bill of lading (*d*) have not hitherto furnished matter for any judicial determination. In the

(*d*) See ch. 2. of this part, sect. 3.

present chapter therefore I shall first consider
[252] the meaning of this extensive phrase, *perils of the sea*, and then proceed to mention other excuses, which the wisdom of the legislature has introduced in very late times.

2. In considering this subject, the first question that presents itself to the mind of an English Lawyer, is, how is the question of *peril of the sea* to be decided? The particular manner in which a loss happens, must always be a question of fact, but admitting it to have happened in a particular manner, is the Judge, before whom a cause is tried, to pronounce whether that manner be a peril of the sea, or are the jury to declare it by their verdict? In general the construction of ambiguous expressions in written instruments is the proper province of the Judge; but in mercantile instruments it often happens that the Judge must have recourse to the usage of trade, and the practice among merchants, to obtain a proper knowledge of the meaning of the words. When the meaning of the words is ascertained, it will rarely happen that the Judge and jury can differ in the conclusion; and probably this question, although it might afford matter of speculation, will never become a subject of serious practical inquiry.

A very remarkable case to this purpose happened about the end of the reign of *Charles the First*. To an action of covenant on a charter-party, which contained
an exception of the *perils of the sea*, the defend-
[253] ant pleaded that the ship was taken by hostile persons unknown, armed in a warlike manner; and thereupon the question whether such a capture were within the exception, was brought before the court by a demurrer in the most strict technical form; the Court

however took the opinion of several merchants by certificate in writing, and afterwards by examination in open Court, upon the meaning of the words of this exception as established by usage among them, and decided in conformity to such opinion (*e*).

At the trial of a cause before *Lord Kenyon*, the late Chief Justice of the King's Bench, in an action upon the case brought by a merchant against the owner of a ship for not safely conveying goods, where the whole matter was left open for discussion by a plea of the general issue, this question was proposed to be agitated by the counsel. His lordship however, without hesitation, declared his opinion to be, that the question was purely a matter of fact for the consideration of the jury; upon the particular circumstances of the case the jury and his lordship coincided, and therefore the case afforded no opportunity of a more solemn discussion of the question (*f*).

These cases certainly furnish very strong authority to shew, that even if the decision of this question does strictly and properly belong to the Judge, yet his decision will be guided by usage and the course of practice among merchants, which are matters of [254] evidence and of fact.

3. In the case of *Pickering v. Barclay*, which I have just before alluded to (*g*), the ship had been overpowered and plundered on the high seas by pirates, and the question was, whether the owners were answerable for the goods; and it was determined in the manner before

(*e*) *Pickering v. Barclay*, 2 Roll. Ab. 248. and Style, 132. The case was argued by *Twisden* for the plaintiff, and *Hale* for the defendant.

(*f*) *Buller v. Fisher*, Sit. p. Mich. Ter. 40 Geo. 3. at Guildhall.

(*g*) *Pickering v. Barclay*, ante, page 253.

mentioned, that they were not answerable, "because," says the reporter, "the taking by pirates was accounted "a peril of the sea." The same question received a similar decision not long afterwards in another cause (*h*). These determinations agree with the rule of the civil law (*i*): And in the case cited in the preceding chapter (*k*), in which the owners were held responsible for goods taken by robbery from the ship in the river *Thames* within the body of a county, *Chief Justice Hale* took notice of this doctrine, and said, "by the Civil "Admiral law the owners are not responsible for a "robbery by pirates at sea." This however is to be understood only in case the ship does not fall into the hands of pirates by any negligence or fault of the master (*l*).

[255] 4. In a case, which came before the Court of King's Bench, a short time before the late alteration of the bill of lading, and which was an action brought to recover the value of goods, for which the master had signed a bill of lading, containing an exception only of the *perils of the sea*, although made, during the time of a war, and which goods were lost in consequence of the ship being designedly struck by the vessel of an enemy; it was doubted by the Court, whether a loss so occasioned were within the meaning of this exception, and the cause never proceeded to a final judgement (*m*). The express exception in this case afforded

(*h*) *Barton v. Walliford.* Comb. 56.

(*i*) *Dig* 4. 9. 3. 1. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari.

(*k*) *Morse v. Slue.* 1 Vent. 190. ante, ch. 3. of this part, sect. 3.

(*l*) *Emerigon,* tom. 1. p. 532.

(*m*) *Bever v. Tomlinson,* East. T. 36 *Geo.* 3. The case came before the Court on a motion for a new trial; the Court directed a new trial in order that the facts might be put upon the record, but it never came on again.

room to contend, that the exception of the act of the King's enemies, which arises out of general rules of law, was meant to be excluded in the particular instance.

5. In the other case just before mentioned (*n*), the ship in which the goods were conveyed, was run down in day-light, and not in a tempest, by one of two other ships, that were sailing in an opposite direction to her, both of which kept to windward, as did also the defendant's ship, but it was matter of so much doubt, whether the master of the defendant's ship, ought to have understood the course which the others would pursue, and have borne to leeward to avoid them, that no blame was considered to be imputable to him [256] for not having done so, nor was any fault attributable to the persons, who had the conduct of either of the other ships. This loss was therefore held to fall within the meaning of this exception, and to have happened by a peril of the sea.

It may be proper to point out the distinction between this case and the case of the vessel, that struck against the anchor of another, to which there was no buoy; which I have mentioned in the preceding chapter (*o*) In this case there was no fault or negligence in the persons belonging to either vessel; in the other, both parties were held to have been guilty of negligence, the one in leaving his anchor without a buoy, the other in not avoiding it, as when he saw the vessel in the river, he must have known that there was an anchor near at hand; or if it be taken that negligence was imputable only to the master, who had left his anchor without a buoy, then he was answerable over to the master and owners of the vessel, whose cargo had been injured:

(*n*) *Buller v. Fisher*, ante, p. 253. (*o*) Sect. 9. p. 242.

and indeed the accident happened in the course of a navigation, to which the exception of the *perils of the sea* did not apply.

6. But not every loss proceeding directly from natural causes, is to be considered as happening by [257] a peril of the sea. If a ship perish in consequence of striking against a rock or shallow, the circumstances, under which the event takes place, must be ascertained in order to decide, whether it happen by a peril of the sea or by the fault of the master. If the situation of the rock or shallow is generally known, and the ship not forced upon it by adverse winds or tempest, the loss is to be imputed to the fault of the master. On the other hand, if a ship is forced upon such a rock or shallow, by adverse winds or tempest, or if the shallow was occasioned by a sudden and recent collection of sand in a place, where ships could before sail in safety; the loss is to be attributed to the act of God or the perils of the sea (*p*). In the case mentioned in the beginning of this chapter (*q*) *Lord Kenyon* observed, that if an earthquake had removed the bank at the time of the accident, the master would have been excused (1).

7. If a vessel, reasonably sufficient for the voyage, be lost by a peril of the sea, the merchant cannot charge the owners by shewing that a stouter ship would have

(*p*) *Roccus*, not. 55. *Strac. de nautis*, part 3. num. 32.

(*q*) *Smith v. Shepherd*, ante, page 249.

(1) Where a ship's bottom is injured by worms in the course of the voyage, so that in consequence thereof she is incapable of completing the voyage, and is condemned, it has been held that the loss is not a loss "by perils of the seas." Rohl. v. Parr, 1 Esp. N. P. C. 444.

outlived the peril; this was decided in the case of a hoy driven by a sudden gust of wind against the pier of a bridge, through which it attempted to pass, and thereby sunk in consequence of a shock, that a stronger vessel might have sustained without sinking [258] (*r*).

8. From the preceding observations and authorities it will be obvious that neither the master nor owners can be answerable for a loss happening to the cargo by *lightning*. Yet upon the principle, upon which the decisions are founded, they must be answerable for a loss by fire proceeding from any *other* cause, whether originally commencing in their own ship, or communicated to it from another. And in the case of an inland carrier (*s*), this point has been solemnly decided, and the law remains unaltered (*t*). But by a statute made in the very same year in which the point was first decided, it is enacted, "That no owner or owners of any ship or "vessel shall be subject or liable to answer for, or make "good, to any one or more person or persons, any loss "or damage, which may happen to any goods "on merchandize whatsoever, which from and [259] "after the *first* day of *September*, 1786, shall be "shipped, taken in, or put on board any such ship or

(*r*) *Amies v. Stevens*, 1 Stra. 128. *Bull.* Nisi Pri. p. 69.

(*s*) *Forward v. Pittard*, 1 Ter. Rep. K. B. p. 27.

It is remarkable, that no authority, either in the law of England, or in the civil law, is cited upon the point of this cause, although the case was very ably argued, and the Court took time for consideration before judgment was pronounced.

(*t*) *Hyde & another v. Trent & Mersey Nav. Comp.* 5 Ter. Rep. K. B. p. 389. But a *warehouseman* is not answerable for a loss by *fire*. *Garside v. Trent & Mersey Nav. Comp.* 4 Ter. Rep. K. B. 581. Nor is the hirer of goods answerable; per *Lord Kenyon, Ch. J.* Sit. at West. p. E. T. 1790. *Longman v. Galini*, in the case of musical instruments hired to be used at the Opera House, and destroyed by fire there.

"vessel, by reason or means of *any fire* happening to "or on board the said ship or vessel." (*u*)

In this clause the *master* is not mentioned; and therefore it may be doubtful whether his responsibility is in this case removed by the statute: but the insertion of the word *fire* in the modern bill of lading has certainly removed it.

9. By another section of the same statute *reciting*, "that disputes may arise, whether the owners or mas- "ters of ships are liable to answer or make good the "value or amount of any gold, silver, diamonds, watch- "es, jewels, or precious stones, which may be lost after "the same have been put on board their ships on freight, "without the shippers thereof declaring at the time the "value of such goods"—It is *enacted*, "That no *mas-* "*ter*, owner, or owners, of any ship or vessel shall be "subject or liable to answer for or make good, to any "one or more person or persons, any loss or damage, "which may happen to any gold, silver, diamonds, "watches, jewels, or precious stones, which from and "after the passing of this act, shall be shipped, taken "in, or put on board any such ship or vessel, by reason "or means of any robbery, embezzlement, making "away with, or secreting thereof, unless the owner or "shipper thereof shall, at the time of shipping [266] "the same, insert in his bill of lading, or other- "wise declare in writing to the master, owner "or owners, of such ship or vessel, the true nature, "quality, and value of such gold, silver, diamonds, "watches, jewels, or precious stones." (*x*)

(*u*) 26 *Geo.* 3. *c.* 86. *sect.* 2. (*x*) 26 *Geo.* 3. *c.* 86. *sect.* 3.

CHAPTER THE FIFTH.

OF THE LIMITATION OF THE RESPONSIBILITY OF THE OWNERS AND MASTER.

1. IN considering the instances, in which the owners are answerable to the merchant for the loss or damage of his goods, I have hitherto forborne to mention the limits of their responsibility, and have treated them as being responsible up to the full extent of the amount of such loss or damage; and so both by the Civil Law and by the Common Law of *England* they formerly were. For although it was decided (*a*) at a time, when the ransom of ships taken by a foreign enemy was not contrary to the laws of the realm (*b*), that such ransom could not be made at a price exceeding the value of the ship and cargo (and the loss of the value of the cargo would fall upon the merchants) yet until the responsibility of the ship-owner for the loss or damage of goods was limited by statute, it was never [261] doubted but that such responsibility was co-extensive with the loss, and the statutes, which have been made to narrow it, are founded upon that supposition.

The ancient laws of *Oleron*, *Wisbuy*, and the *Hanse-Towns*, contain no provision on this subject. Nor is any alteration of the rule of the Civil Law noticed by

(*a*) *Helley v. Grant, & Graham & another v. Hall*, cited 1 Ter. Rep. K. B. 79.

(*b*) 22 *Geo.* 3. *c.* 25. prohibits ransom.

Roccus (*c*), although *Vinnius*, an earlier author, says, that by the law of *Holland* the owners are not chargeable beyond the value of the ship and the things that are in it (*d*); in conformity to which principle the *French* Ordinance declares, "that the owners of ships shall be "answerable for the acts of the master, but shall be dis- "charged therefrom upon relinquishing their ship and "the freight" (*e*). A similar provision is contained in the Ordinance of *Rotterdam*, made in 1721, which declares, "That the owners shall not be answerable for "any act of the master done without their order, any "further than their part of the ship amounts to" (*f*): and by other articles of the same Ordinance it appears that each part-owner is liable only for the value [262] of his own share (*g*). *Valin*, in his commentary on the *French* Ordinance (*h*), informs us that the same regulations are also established at *Hamburgh* (*i*).

2. The earliest provision of the *British* legislature on this subject is a statute made a few years after the date of the Ordinance of *Rotterdam*, and which was passed in consequence of a petition presented to the House of Commons by several merchants and other persons own-

(*c*) The Notabilia of this author, who was a *Neapolitan*, were first published in 1655.

(*d*) *In Peckium*, p. 155, published in 1647, the author cites *Grotius*, lib. 3. Introduc. ad Jurisp. Bat. c. 1. and lib. 2. de jure belli et pacis, c. 11. n. 13.

(*e*) Liv. 2. tit. 8. *des proprietaires*, art. 2. The encouragement of maritime commerce, especially among the noblesse, was one of the principal objects of this ordinance. See same book, & tit. art. 1. and *Valin's* preface to that title.

(*f*) *Art.* 167. 2 *Magens*, 107.

(*g*) *Art.* 126. 127. 2 *Magens*, 101. 102.

(*h*) Tom. i. p. 569.

(*i*) An extract from the Ordin. of *Hamburgh*, dated 1731, is given in 2 *Magens*, but the article containing this provision is not noticed.

ers of ships belonging to the port of *London* (*k*), setting forth the alarm of the petitioners at the event of a late action, in which it was determined that the owners were answerable for the value of merchandize embezzled by the master. The foundation of this limitation is mentioned in the preamble of the statute: which states, "That it is of the greatest consequence and importance "to this kingdom to promote the increase of the num- "ber of ships and vessels, and to prevent any discour- "agement to merchants and others from being interest- "ed and concerned therein: and that it has been held, "that in many cases owners of ships or ves- "sels are answerable for goods and merchandize [263] "shipped or put on board the same, although "the said goods and merchandize, after the same have "been so put on board, should be made away with by "the masters or mariners of the said ships or vessels, "without the knowledge or privity of the owner or "owners, by means whereof merchants and others are "greatly discouraged from adventuring their fortunes, "as owners of ships or vessels, which will necessarily "tend to the prejudice of the trade and navigation of "this kingdom." It is "Therefore, for ascertaining "and settling how far owners of ships and vessels shall "be answerable for any gold, silver, diamonds, jewels, "or precious stones, or other goods or merchandizes, "which shall be made away with by the masters or "mariners, without the privity of the owners thereof," enacted, "That no person or persons, who is, are, or

(*k*) See Commons Journals for the year 1733, page 277, the case referred to by the petition, appears clearly to be that of *Boucherv. Lawson*, cited in part 2. chap. 2. sect. 6. The bill went through both houses without a division. The clauses directing proportional compensation and relief in equity were introduced in the House of Lords.

" shall be owner or owners of any ship or vessel, shall " be subject or liable to answer for or make good to any " one or more person or persons, any loss or damage " by reason of any embezzlement, secreting, or making " away with by the master or mariners, or any of them, " of any gold, silver, diamonds, jewels, precious stones, " or other goods or merchandize, which from and after " the 24th day of *June*, 1734, shall be shipped, taken " in, or put on board any ship or vessel, or for any act, " matter, or thing, damage or forfeiture, done, occasion- " ed, or incurred, from and after the said 24th day of " *June* 1734, by the said master or mariners,
[264] " or any of them, without the privity and knowl- " edge of such owner or owners, further than the " value of the ship or vessel, with all her appurtenances, " and the full amount of the freight due, or to grow " due, for and during the voyage, wherein such em- " bezzlement, secreting, or making away with as afore- " said, or other malversation of the master or mariners, " shall be made, committed, or done ; any law, usage, " or custom to the contrary thereof in anywise not- " withstanding (*l*)."

3. And by the *second* section of the same statute, if several freighters sustain losses exceeding in the whole the value of the ship and freight, they are to receive compensation thereout in proportion to their respective losses : and any one freighter, on behalf of himself and the other freighters, or any part-owner, on behalf of himself and the other part-owners, may file a bill in a Court of Equity for the discovery of the total amount of the losses, and of the value of the ship, and for an equal distribution and payment.

(*l*) 7 *Geo.* 2. *c.* 15. A. D. 1734.

But by the *third* section, if such bill is filed by or on behalf of the part-owners, the plaintiff must make affidavit that he does not collude with the defendants, and must offer to pay the value of the ship and freight, as the Court shall direct.

4. And by the *fourth* section, it is provided, declared, and enacted, "That nothing in this [265] "present act contained shall extend, or be con- "strued to extend, to impeach, lessen, or discharge "any remedy, which any person or persons now hath, "or shall, or may hereafter have against all, every, or "any the master and mariners of such ship or vessel, "for or in respect of any embezzlement, secreting, or "making away with any gold, silver, diamonds, jewels, "precious stones, or merchandize, shipped or loaded "on board such ship or vessel, or on account of any "fraud, abuse, or malversation of and in such master "and mariners respectively; but that it shall and may "be lawful to and for every person or persons so injur- "ed or damaged, to pursue and take such remedy for "the same, against the said master and mariners re- "spectively, as he or they might have done before the "making of this act."

5. By this statute therefore the legal responsibility of the *master* is left unaltered in all the cases before enumerated, and that of the *owners* also in the case of a robbery committed by persons *not* belonging to the ship. But where a ship in the river *Thames* was forcibly plundered of dollars during the night by a gang of robbers, in consequence of information given by one of the mariners of the ship, who afterwards shared the booty; the responsibility of the owners was held not to

extend beyond the value of the ship and freight by virtue of this statute (*m*).

6. Immediately after the decision of this case, [266] and in consequence of the danger, to which the facts, that were disclosed in it, shewed the owners to be exposed, another petition was presented to the House of Commons (*n*) on behalf of several owners of ships belonging to *London* and other parts, and in compliance therewith, another statute was passed (*o*), fixing the same limits to the responsibility of the owners in the several cases mentioned in the preceding statute, and also in the case of robbery, "although the master or "mariners shall not be in anywise concerned in or privy "to such robbery, embezzlement, secreting, or making "away with." This statute also contains the same provisions as the preceding act, for equal distribution and discovery by bill in equity, and also for remedy against the master and mariners: and (as was mentioned in the preceding chapter) has entirely taken away the responsibility of the owners in the case of loss or damage by *fire*.

7. It may be observed that in those parts of each of these statutes, which treat of the damage and responsibility, the words "*owner or owners of any ship or vessel*" are used, and not the word *part-owners*, although the part-owner by name is enabled to file a bill in equity on behalf of himself and all the other part-owners. And therefore it may be questioned whether if any [267] one part-owner should be privy to an act of mal-practice, and so clearly be excluded from

(*m*) *Sutton v. Mitchell*, 1 Ter. Rep. K. B. p. 18.

(*n*) See Commons Journals for the year 1786, page 296. This act also was passed without a division in either house of parliament.

(*o*) 26 *Geo.* 3. *c.* 86. *sect.* 1.

the benefits of the statute, the other part-owners would be excluded also. But as the master is very often a part-owner, and the first statute was evidently framed to ease the owners from a part of their responsibility for *his* misconduct, it should seem that by *his* privity, they would not lose the benefit of *that* statute; and as both statutes are made in *pari materia*, and expressed in the same terms, probably by the true construction of both, one part-owner cannot prejudice the others by his own individual misconduct.

CHAPTER THE SIXTH.

OF THE GENERAL DUTIES OF THE MERCHANT.

1. THE general duties of the merchant (those only excepted, which relate to the payment of freight and of gross average, and which will form the subject of distinct chapters) are comprised in a very narrow compass: the hirer of any thing must use it in a lawful manner, and according to the purpose, for which it is let. The merchant must lade no prohibited or uncustomed goods, by which the ship may be subject-
[268] ed to detention or forfeiture (*a*). (1) In general, even in the case of affreightment by charter-party, the command of the ship is reserved to the owners or the master appointed by them, and therefore

(*a*) *Roccus* not. 85. *Dig.* 19. 2. tit. 3. *fret* art. 9. 61. 1. *French* Ordinance, liv. 3.

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(1) Therefore where goods were clandestinely shipped on board an American ship, bound from New-York to Scotland, which goods were prohibited by the laws of Great Britain from being imported into that country, and in consequence thereof, the ship was seized and the master was compelled to pay a large sum of money for her release, the Court held the action maintainable, although it was contended on behalf of the defendant, that no country takes cognizance of the municipal laws of another country, and that the lading of such goods here was lawful, and therefore the act was not tortious, but *damnum absque injuria*. Smith v. Elder, 3 John. Rep. 105.

the merchant has not the power or oportunity of detaining the ship beyond the stipulated time, or employing it in any other than the stipulated service. But by the charter-parties under which ships are let to freight to the *East-India Company*, the command and disposal of the ship are reserved to the company, and the master, although appointed by the owners, is bound to obey the orders of the company at home, and of their factors and servants abroad; and it is always stipulated that nothing shall be paid by the company for freight or demurrage, unless the ship returns home in safety (*b*). Yet in a case where the company detained a ship so long in *India*, that she became unfit for the voyage home, and was disposed of there, so that by reason of the particular stipulation the owners could sustain no action at law upon the contract, a Court of Equity ordered the company to make a proper allowance for the actual and probable earnings and the value of the ship (*c*). So where a ship, hired by the company to be employed according to the then usual terms of their charter-parties in trade and warfare, was sent upon a service of observation and discovery to explore the passage to the eastward of the *Isle of Banca*, and there struck on a rock, and was lost, [269] and the owners brought an action against the company for thus exposing the ship to danger in a service not warranted by the charter-party without their knowledge or consent, *Lord Kenyon*, before whom the cause was tried, declared himself to be of opinion that the action was proper in point of general principle, but the plaintiffs failed in their suit, because it appeared

(*b*) See the clauses cited in *Hotham v. East-India Company*, ante, chap. 1. of this part, sect. 14.

(*c*) *Edwin & others v. East-India Company*, 2 Vern. 210.

that the company's intention to employ the ship in this service was before her departure from *England* made known to the person, who managed the ship on behalf of the owners, and not objected to on their part (*d*).

2. Some of the ancient maritime codes and more modern foreign ordinances (*e*) have fixed the payment to be made by the merchant, who, having taken a ship to freight declines to lade her in pursuance of his agreement, or who, before the commencement, or during the course of the voyage withdraws his goods from the ship, or having hired a ship to go to a distant port and [270] engaged to furnish a cargo homeward, fails to do so, whereby the ship is forced to return empty; and have decided that in some instances the whole, in others a moiety of the sum, that would have become due as freight, shall be paid as a compensation to the owners. But in all these cases the law of *England* leaves the amount of the compensation to be ascertained by a jury, if the parties cannot agree about it: and a jury will form their estimate upon a consideration of all the circumstances of the case, and of the real injury sustained by the owners, which cannot be properly settled by positive rules.

3. We have seen by a copy of the bill of lading (*f*), that the master undertakes to deliver the goods upon

(*d*) *Lewin & others v. East-India Company*, Peake's Cases at *Nisi Prius*, p. 241. It was an action upon the case, and the plaintiffs were nonsuited; they afterwards brought another action in the Court of *Common Pleas*, which was tried before *Lord Eldon* at the Sittings after Hil. Ter. 1800, and were again nonsuited on the same ground. The terms of the charter-parties are now altered, and the ships are hired to be employed in trade and in warfare, *and on any other service whatsoever*.

(*e*) Ordin. of the *Hanse-Towns*, art. 11. *French* Ordinance, liv. 3. tit 3. *fret.* art. 3 & 6. and 8 & 9. and *Valin* thereon. *Guidon*, chap. 9. art. 11.

(*f*) Ch. 2. of this part, sect. 3.

the payment of freight with primage and average accustomed.

The word *primage* denotes a small payment to the master for his care and trouble, which he is to receive to his own use, unless he has otherwise agreed with his owners. This payment appears to be of very ancient date, and to be variously regulated in different voyages and trades. In the *Guidon* it is called "*la contribution "des chausses ou pot de vin du maitre.*" It is sometimes called the master's hat-money.

The word *average* in this place denotes several petty charges, which are to be borne partly by the ship and partly by the cargo, such as the ex- [271] pence of towing, beaconage, &c. Some of the foreign Ordinances specify the particulars that fall under this head, and the mode of distributing the charge(*g*), but with us they depend entirely upon usage, and an attempt to enumerate them would afford neither instruction nor entertainment.

This and the preceding article of primage are often commuted for a specific sum or a certain per centage on the freight (1).

(*g*) *French* Ordin. liv. 3. tit. 7. *Avaries*, art. 8. & 9. and Ordin. of *Stockholm*, tit. *Average*, art. 1. 2. *Magens*, 277. Ordin. of *Wisbuy*. art. 44. 56. 59. 60. *Guidon*, chap. 5. art. 12 to 19. and *Cleirac* on the 24th art. of the laws of *Oleron*.

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(1) Connected with this subject, it may not be improper to state the duty of the merchant, who ships goods for the account of and consigned to another person. In respect to which it is said, that he must give notice of the shipment by a letter of advice, as otherwise the consignee would loose the opportunity to insure them. This rule however may be controlled by the course of dealing between the parties, in which case such letter of advice may be dispensed with. Per Lawrence J. in Goom v. Jackson, 5 Esp. N. P. C. 112.

CHAPTER THE SEVENTH.

OF THE PAYMENT OF FREIGHT.

1. IN treating of the payment of the *freight*, the principal duty of the merchant, I shall consider, *first*, the cases in which the entire freight is to be paid according to the terms of the contract; and, *secondly*, those in which a part only of the stipulated sum may be claimed.

The contract for the conveyance of merchandize is in its nature an entire contract: and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general [272] derive no benefit from the time and labor expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week (1). The

(1) And even if the goods arrive at the port of destination, though the master may retain them until the freight is paid, yet no action lies to recover the freight, until the goods are actually delivered. Therefore, where a ship was chartered by the owner, and the charterers took on board 872 bushels of corn for certain shippers, and after the arrival of the ship at the port of destination, and before the delivery of the corn, the owner of the ship turned the charterers out of possession of the ship. and refused to deliver a part of the corn, until the freight was paid to him, and finally retained 40 bushels for this purpose, the court held that the freight was not due, because the cargo had not been wholly delivered, and the charterers were not

cases, in which a partial payment may be claimed, are exceptions to the general rule, founded upon principles of equity and justice, as applicable to particular circumstances. On the other hand, an interruption of the regular course of the voyage, happening without the fault of the owner, does not deprive him of his freight if the ship afterwards proceed with the cargo to the place of destination, as in the case of capture and recapture (*a*). In such a case however there will be a deduction for salvage: and if the ship were hired by the week or month, it may be doubted whether the merchant be

(*a*) The RACE-HORSE, *White*, 3 Rob. A. R. 101. And see the observations of *Mr. Justice Chambre* and *Lord Alvanley* in the case of *Beale v. Thompson*, 3 Bos. & Pull. 420 & 431 upon the dictum of the late *Chief Justice Eyre* on this subject, in the case of *Curling v. Long*, 1 Bos. & Pull. 637.

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ready, and had it not in their power to deliver the same. Lane v. Penniman, &c. 4 Mass. Rep. 91.

But in some cases the whole freight becomes due although the cargo has not been carried to the port of destination; as in case of capture, if the ship be carried into port, and the cargo be unlivered by order of the Court of Admiralty, the master is not compellable to reload it and carry it to the port of destination, although both ship and cargo be cleared. For a separation has taken place between the ship and cargo, and the contract is held to have ceased by the act of unlivery. At the moment of separation, the ship acquires a right to proceed where the master pleases; and the contract being once dissolved, cannot be revived. The Hoffnung, 6 Rob. Adm. Rep. 231.

chargeable for the period of detention (*b*) (1). But although the delivery of the goods at the place of destination is in general necessary to entitle the owner to the freight, yet with respect to living animals, whether men or cattle, which may frequently die during the voyage without any fault or neglect of the persons be-
[273] longing to the ship, it is said (*c*), that if there be no express agreement whether the freight is to be paid for the lading, or for the transporting them, freight shall be paid as well for the dead as for the living; if the agreement be to pay freight for the *lading* them, their death certainly cannot deprive the owners of the freight; but if the agreement be to pay

(*b*) See *Beale v. Thompson*, as to wages, 3 Bos. & Pull. 405, and particularly the judgment delivered by *Mr. Justice Heath*. The principle appears to be the same in the case of freight. And in such a case it might perhaps be necessary to declare specially as upon a new contract. The case of *Beale v. Thompson*, was taken to the King's Bench by writ of error, and there decided in favour of the plaintiff, 4 East 546.

(*c*) *Dig.* 14. 2. 10. *Roccus*, not. 76, 77, 78. *Molloy*, book 2. chap. 4. sect. 8.

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(1) By the final decision, however, in the case of Beale v. Thompson, 4 East. Rep. 546., it would seem that in case of a capture and subsequent release, though the ship were hired by the week or month, the owner would be entitled to recover freight for the time of the detention. In that case, the seaman recovered his wages during the detention.

And in case a ship, in the course of the voyage, becomes disabled, and is obliged to go into port to repair, it seems that if the freight be payable monthly or weekly, the owner is entitled to recover it for the time of detention, notwithstanding the owner has contracted to keep the ship tight and in repair during the voyage. But if there should be delay or neglect on his part, the case might be varied. Havelock v. Geddes, 10 East. 555.

freight for *transporting* them, then no freight is due for those that die on the voyage, because as to them the contract is not performed. These distinctions are found in the civil law, and adopted by all the writers on this subject. In this country it is not unusual to pay for goods shipped for the *East* or *West-Indies*, at the time of the shipment. But this payment, although commonly called *freight*, is not strictly or properly so denominated; that word denoting the price rather of actual carriage, than of receiving goods in order to be carried: and therefore in a case before the Court of Common Pleas, the Court, admitting that an action might be brought for money agreed to be paid for receiving goods on ship-board in order to be transported, decided that such money could not be sued for or recovered *by the name of freight* (*d*) (1). If a pregnant woman be delivered during the voyage, no freight is due for the infant (*e*).

(*d*) *Blakey v. Dickson*, 2 Bos. & Pull. 321.

(*e*) *Roccus*, not. 79. *Molloy*, book 2. chap. 4. sect. 8.

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(1) Foreign writers however do not distinguish the cases by different names. See the authors hereinafter cited. And in a case on a policy of insurance, it was held that a purchase of *three eighths* of the tonnage of a ship for a particular voyage, was well insured by the words "*freight advanced*;" and was subject to general average. Sansom v. Ball, 4 Dall. Rep. 459. And it was treated as freight by the Court in Watson v. Duykinck, 3 Johns. Rep. 335. hereinafter cited. See also the opinion of Judge Peters in Giles v. The Brig Cynthia, 1 Peters. Adm. Rep. 203. And see Cheviot v. Barker, 2 John. Rep. 346.

Where freight has been advanced on a contract for the transportation of goods, it has been a question how far the shipper

2. When goods are sent in a general ship in
[274] pursuance of the second species of contract before mentioned, the amount of the freight is either settled by the agreement of the parties or by the

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was entitled to recover it back in case the goods are not transported to their place of destination. On this subject the English books are almost silent; but foreign jurists have decided the point. Cleirac in his commentary on the judgments of Oleron, art. 9. n. 9. (Les Us. et Cout. de la mer, p. 42.) declares that in cases of shipwreck, the master is bound to render to the merchants, the advances made upon the freight, and he cites a decision of an early jurist in confirmation of his doctrine: naufragio facto exercitor naula restituit, quæ ad manum percepe-rat, ut qui non trajecerit. The ordinance of the marine (tit. du fret, art. 18.) recognizes this ancient rule, and ordains that if goods be lost by the perils of the seas, the master shall be holden to refund the freight advanced to him, unless there be a *special agreement to the contrary.* Valin (comm. sur l'ord. tom. 1. p. 661.) says that this agreement always contains an express stipulation, that the money advanced shall be retained in any event, which may happen in the course of the voyage. The policy of the general rule on this subject, was to take away the temptations to negligence or misconduct, which the certainty of freight was calculated to produce in the master. Roccus is also of opinion that freight paid in advance must be refunded, if the ship be lost during the voyage, or is prevented by any sinister accident from arriving at her port of destination. "Naulum seu vectura non debetur, si locator navis propter amissam navim ve alium casum in eum contingentem iter non fecerit, imo si solutum fuerit, repetitur, de nav. et naulo. not. 80." This doctrine he derives from the Digest, lib. 19. tit. 2. l. 15. § 6. Locat. conduct. Straccha (de navi. 3. n. 24.) with whom Loc-

usage of the trade. In the case of a charter-party, if the stipulated payment is a gross sum for an entire ship, or an entire part of a ship, for the whole voyage, the gross sum will be payable although the merchant have

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cenius (de jur. marit. lib. 3. ch. 6. § 11.) and Roccus (n. 81.) coincide, is of opinion that according to this law, the master is entitled to his freight *pro rata itineris*, where he has not been in fault. Ubi munere vehendi non sit functus pro parte enim itineris, quæ merces advectæ sint, vecturam deberi, æquitas suggerit, et consequenter pro rata mercedis exonerationem, ut scribit Paul.

Pothier (Charte-partie, n. 63.) thinks the rule of the French ordinance the most equitable, and that no freight is due in such a case.

In Watson v. Duykinck, 3 John. Rep. 335., the Supreme Court said, that the general principle undoubtedly is, that freight is a compensation for the carraige of goods, and if paid in advance and the goods be not carried, by reason of any event not imputable to the shipper, it then forms the ordinary case of money paid upon a consideration which happens to fail. But that if the contract be to pay freight for the loading of the article on board, and not for the transportation and delivery there, the freight is not to be refunded in the event of the goods not being transported. And they said this rule was not a new refinement, but might be traced to the civil law, and was most clearly stated by Gothofredus, in his notes on the Digest,* (14. 2. 10). Conduxisti vehenda mancipia? mancipium unum in navi mortuum est; quæritur, num vectura debeatur? Si de mancipiis *vehendis* inita conventio est, non debetur: Si de mancipiis tantum navi imponendis, debetur. And therefore in the above case, where the plaintiff had paid the defendant $100, under an agreement that, "in consideration of $100 to be paid

* Lex Rhodia de Jactu.

not fully laden the ship. And if a certain sum be stipulated for every ton, or other portion of the ship's capacity, for the whole voyage, the payment must be according to the number of tons, &c. which the ship is proved capable of containing, without regard to the quantity actually put on board by the merchant (*f*). On the other hand, if the merchant has stipulated to pay a certain sum per cask or bale of goods, the payment must be in the first place according to the number of casks or bales shipped and delivered (*g*), and if he has further covenanted to furnish a complete lading, or a specific number of casks or bales, and failed to do so,

(*f*) *Roccus*, not. 72. 75. (*g*) *Roccus*, not. 73. 75.

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immediately, he would suffer the plaintiff to proceed in the sloop (of which the defendant was master) as a passenger on the voyage, and to load on board for transportation, merchandize to the value of $600, and that the defendant would provide meat, drink, &c. for the plaintiff during the voyage;" and the plaintiff put on board goods to the amount of $600, and embarked, and the sloop after being at sea two days, sprung a leak and was obliged to return, and was wrecked and lost on her return, the Court held that the money could not be recovered back. See the elaborate opinion of Kent, Chief Justice, from which the foregoing remarks are principally extracted.

In 2 Show. 291. a dictum is reported of Lord Chief Justice Saunders, which would seem to imply that advance money for freight was in no event to be refunded. See also the opinion of Chambre J. in Blakey v. Dixon, 2 Bos. & Pull. 321.

If freight or passage money be advanced, and the party is guilty of delay or neglect, he is not entitled to a return, though he has not received the benefit of the contract. See note in Giles v. Brig Cynthia, 1 Peters. Adm. Rep. 207.

he must make good the loss, which the owners have sustained by his failure, to be settled, in case of disagreement, by a jury, who will take all the circumstances into their consideration (1). Where a ship hired to go beyond sea, to fetch home a cargo for which a certain rate *per ton* was to be paid, (nothing being payable for the outward voyage,) was forced to return in ballast, the merchant's factor having no goods to put on board, the Court of Chancery decreed payment [275] of the freight (*h*). (2)

If an entire ship be hired, and the burthen thereof expressed in the charter-party, and the merchant cove-

(*h*) *Westland v. Robinson*, cited 2 Vern. 212.*

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(1) And if the master, in consideration of freight to be paid him at a certain rate per ton for the goods, agrees to load a *complete* cargo and proceed therewith to the port of delivery, he will be liable to pay damages if he loads a *short* cargo only. Atkinson v. Ritchie, 10 East. Rep. 530. But he may nevertheless maintain an action for the recovery of the freight of the *short* cargo delivered; for in such a case the delivery of a *complete* cargo is not a condition precedent. Ritchie v. Atkinson, 10 East. 295. And the neglect to load a complete cargo, is not excused by a *bona fide* conduct in quitting the port of loading under a well grounded apprehension of a hostile embargo and seizure. 10 East. Rep. 530.

(2) If a merchant send the vessel of another for a cargo to a designated port and obtains none, he who hired the ship must pay, "empty for full." Giles v. Brig Cynthia, 1 Peters. Adm. Rep. 203. 207. Beawes, 110.

* See Blight v. Page, post. 407.

nant to pay a certain sum for every ton, &c. of goods which he shall lade on board, but do not covenant to furnish a complete lading, the owners can only demand payment for the quantity of goods actually shipped (*i*).

3. In all the instances before mentioned the owners take upon themselves the chance of the long or short duration of the voyage. But if the merchant engage to pay a certain sum for every month, week, or other portion of the voyage, in this case, the risk of the duration falls upon the merchant: and if no time be fixed for the commencement of computation, the computation will begin from the day, on which the ship breaks ground, and commences the voyage, and will continue during the whole course of the voyage, and during all unavoidable delays not occasioned by capture (*k*), or by such circumstances as give rise to the general average or contribution, that will be treated of in a subsequent chapter.

In this case of the payment of freight, as in [276] other mercantile contracts, a month is to be understood of a *calendar* not a *lunar* month (*l*).

4. The time and manner of payment of freight are frequently regulated by express stipulations in a charter-party, and when that is done, the payment must be according to the agreement. If there be no express stipulation, we have already seen that the master is not bound to part with the goods, until his freight is paid; and if by the regulations of the revenue the goods are to be landed and put into the King's warehouse, if the duties are not paid, the master may enter them in his own

(*i*) *Lady James v. E. I. Company*, coram *Kenyon*, Ch. J. at Guildhall, Sit. p. Mich. Term. 1789. *Roccus*, not. 75.

(*k*) Ante, p. 272. and note, ibid.

(*l*) *Jolly v. Young*, 1 Esp. N. P. cases, 186.

name, and thereby preserve his lien (1). At the trial of an action brought for freight on a charter-party, by which it was agreed that the goods should be delivered at *London* agreeably to the bills of lading, and by the bills of lading they were to be delivered to a third person on his payment of the freight, and in fact they were delivered to him, but he refused to pay the freight, because the merchant the defendant, who was the consignor, was indebted to him to a greater amount: *Lord Kenyon* held that the freight could not be recovered of the consignor, because the master ought not by the terms of the contract to have delivered the goods without receiving the freight from the consignee (*m*). But this opinion of his Lordship was afterwards over-ruled in the Court of King's Bench and a [277] new trial ordered, at which the plaintiff succeeded. If a consignee *receive* goods in pursuance of the usual bill of lading, by which it is expressed that he is to pay the freight, he by such receipt makes himself debtor for the freight, and may be sued for it (*n*).

If a consignee, known as such to the master, sell the goods before they are landed, he and not the buyer is liable to be sued for the freight, although the buyer enter the goods at the custom-house in his own name (*o*).

(*m*) *Penrose & others v. Wilkes*, Sit. p. Hil. Ter. 1790, coram *Kenyon*, Ch. J. at Guildhall.

(*n*) *Roberts v. Holt*, 2 Show. 443. This was probably the case of a *general* ship.

(*o*) By *Lord Kenyon* at Nisi Prius. *Artaza v. Smallpiece*, 1 *Espin.* N.P. Cas. 23. See also *The* THERESA BONITA, *De Jong.* 4 Rob. A. R. 236.

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(1) And if the master in the course of the voyage is compelled to pay duties in order to obtain a clearance of his cargo on freight, he may bind the owner of the ship to the payment, Milward v. Hallet, 2 Cain. Rep. 77. Kent J. dissenting.

Neither does such entry of goods at the custom-house, made by a person, who is only agent for the consignor, and known to the master to be acting in that character, render such agent liable to be sued for the freight (*p*).

5. In some cases freight is to be paid, or rather an equivalent recompense made to the owners, although the goods have not been delivered at the place of destination, and so the contract for conveyance is not strictly performed. Thus, if part of the cargo be thrown overboard for the necessary preservation of the ship and the remainder of the goods, and the ship afterwards reach the place of destination, (*q*), the value of this part is to be answered to the merchant by way [278] of general average, and the value of the freight thereof allowed to the owner in the manner, that will be explained hereafter. So if the master be compelled by necessity to sell a part of the cargo for victuals or repairs, the owners must pay to the merchant the price, which the goods would have fetched at the place of destination, and therefore are allowed to charge the merchant with the money, that would have been due, if they had been conveyed thither (*r*).

The *French* Ordinance also directs the payment of freight in another instance, which I do not find provided for in any other Ordinance, or mentioned by any author except with reference to this particular article of the *French* Ordinance, which is as follows: "If it hap- "pen that commerce be prohibited with the country, to "which a ship is in the course of sailing (*en route*), and "the ship be obliged to return with its lading, there

(*p*) *Ward v. Felton*, 1 East's Rep. K. B. 507.

(*q*) *Roccus*, not. 89. *French Ordinance*, liv. 3. tit. 3. *fret.* art. 13.

(*r*) *French Ordinance*, liv. 3. tit. 3. *fret.* art. 14. Ordin. of *Wisbuy*, art. 55. and 69. ante, part 3. ch. 3. sect. 10.

"shall be due only the freight outward, although the "ship be hired out and home" (*s*). The commentators on this article agree that the freight outward must be paid, if the ship be freighted outward only (*t*) (1).

6. If in a time of war a neutral vessel, carrying goods belonging to the subjects of one of [279] the belligerent powers, be taken by those of the other (in which case the goods are lawful prize, but the ship is to be restored), the captor pays the whole freight, because he represents the enemy, by possessing himself of the enemy's goods *jure belli;* and although the whole freight has not been earned by the completion of the voyage, yet, as the captor, by this act of seizure, has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight (*u*). This however is to be understood of such goods only, as a neutral vessel may

(*s*) *French Ordinance*, liv. 3. tit. 3. *fret*, art. 15.
(*t*) *Valin*, tom. 1. p. 657. *Pothier*, Ch. Partie. num. 69.
(*u*) The COPENHAGEN, *Mening*, 1 Rob. A. R. 289.

(1) And where a ship arrived at the port of destination, but her cargo was prohibited from entry, the Court held, in conformity to the doctrine of Valin and the French ordinance, that freight was earned for the outward voyage. Morgan v. The Insurance Company of N. America, 4 Dall. 455. And the court said that it was not like the case of a ship prevented from entering a port in consequence of a blockade, for there the voyage is not performed, and it is impossible to say certainly that it would be safely performed, if there were no blockade. id. ibid. And in case of blockade of the port of destination no freight would be due. Scott v. Libby, 2 John. Rep. 336.

convey by the law of nations, and of a trade ordinarily allowed to the neutral nation by the government, to whose subjects the goods belong. If the goods are contraband according to the law of nations, such as naval stores, &c. no freight is to be paid by the captor (*x*); and this whether the master know the quality of the goods or no; for in time of war he is bound to know the contents of his cargo, and cannot be permitted to aver that he was ignorant of them (*y*); nor is any freight to be paid by the captor, if the ship is employed in bringing the produce of the colony of a belligerent power to the mother country (*z*), or in the [280] coasting trade between one port and another of the same country (*a*), or in carrying the goods, even of neutrals, directly from the mother country to its colony (*b*), or from one hostile nation to the colony of another hostile nation in alliance with it (*c*), if these trades were not, in time of peace, open to the neutral nation, whose ship is so employed; because, in all these cases, it is evident, that the trade is opened in the time of war merely for the convenience of the belligerent power, and to relieve that power from a part of the difficulties occasioned by the war; and the neutral vessel so employed, thereby furnishes direct assistance to the belligerent power. But as trade from a port of one nation to a port of another is in general open to all countries, freight is to be paid to the owners of a neutral ship employed in carrying the goods of an enemy from

(*x*) The MERCURIUS, *Meincke*, id. 288.

(*y*) The OSTER RISOER, *Jurgenson*, 4 Rob. A. R. 199.

(*z*) The REBECCA, *Moore*, 2 Rob. A.R.101. See also the AMERICA, *Sherborne*, id. vol. 3. p. 36.

(*a*) The EMANUEL, *Sodestrom*, 1 Rob. A. R. 296. and the MERCURIUS there cited.

(*b*) The IMMANUEL, *Eyeenberg*, 2 Rob. A. R. 186. and the ANNE, *Lord*, id. vol. 3. p. 91. *note a.* and the NANCY, *Joy*, id. p. 82.

(*c*) The ROSE, *Young*, 2 Rob. A. R. 206.

a port of one nation hostile to the captors, to a port of another nation equally hostile (*d*). (1)

Again, if a ship be taken and retaken, and carried by the recaptors into a port short of the place of destination, and the ship be there restored, before the cargo is restored, either by reason of a delay on the part of the merchant to claim the cargo, or of doubt or litigation upon his right to restitution, the Court [281] of Admiralty does not require the ship to wait the doubtful event of the claim of the cargo, in order to convey it to the place of destination, but gives the owners their whole freight, subject only to the deduction of salvage upon the amount of it (*e*). And this with great justice; for the capture is not imputable to the master; the delay of obtaining restitution of the cargo is imputable to the merchant.

If the ship of an enemy, carrying the goods of a neutral be taken, and the captor conduct the ship and cargo to the place of destination, and so fulfil the contract of the master, the captor is entitled to receive the freight of the goods upon their restitution to the merchant; but he is not entitled to this, if he take the ship to a

(*d*) The WILHELMINA, *Carlson*, 2 Rob. A. R. 101. *notis*.
(*e*) The RACE HORSE, *White*, 3 Rob. A. R. 101. and see the cases cited in the note at the end of that report.

(1) These decisions of the English Admiralty Courts have grown out of the incidents of the late and present war. The correctness of the doctrines as to the colonial trade, and the distinctions as to a war and a peace trade has been questioned, but I am not aware of any decisions of our own courts of law upon the subject.

different port, and do not perform the original voyage (*f*). (1)

(*f*) The FORTUNA, *Tadsen*, 4 Rob. A. R. 278, and the case of the VRETHEID, and also Bynkershoek, Quest. J. Pub. lib. 1. c. 13. there cited. This is different from the old rule as laid down in the *Consolato del mare*, ch. 173.

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(1) In cases of capture and condemnation of the cargo, the rate at which freight is to be allowed by the captors, is not necessarily to be taken at the price fixed in the charter-party, even where no fraud is imputed to the contract itself. When by the events of war navigation is rendered so hazardous, as to raise the price of freight to an extraordinary height, captors are not bound to that inflamed rate of freight. When no such circumstance exists, when a ship is carrying on an ordinary trade, the charter-party is undoubtedly the rule of valuation unless impeached. The captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. The Twilling Riget, 5 Rob. Adm. Rep. 77.

In such cases if the value of the cargo condemned is not sufficient to pay the freight decreed as a charge on the cargo, and the expenses of the captors, in ordinary circumstances the freight is entitled to the priority; though this general rule may sometimes be varied by the peculiar nature of the trade and the situation of the trading countries. The Vrow Henrica. 4 Rob. Adm. Rep. 343. But the expenses of the neutral master, when decreed *to be a charge on the cargo*, are not entitled to the same priority. The Bremen Flugge, 4 Rob. Adm. Rep. 90.

Though it is the allowed privilege of neutral trade to carry property of the enemy, subject to its capture and a temporary detention, and the captor takes it with the burthen of freight; yet if the party prevaricates or conducts himself with ill faith, he is not entitled to freight. For fraud and misconduct amount to a forfeiture. The Vrow Henrica, 4 Rob. Adm. Rep. 343.

7. As it may frequently happen that goods brought in specie to the place of destination, may be so deteriorated during the course of the voyage, as to be of no value to the merchant, it is important to consider, whether the merchant is bound to pay the freight under

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If a ship captured be lost by the *negligence* of the prize master, where the ship is innocently employed, and a part of the cargo only saved, which is insufficient to pay the *freight*, the Court will not only decree restitution of the value of the ship, but also of the full freight against the captors personally. The Der Mohr, 3 Rob. Adm. Rep. 129. 4 Rob. Adm. Rep. 314.

If a ship be condemned, and the cargo acquitted as neutral property, and afterwards is carried by the captors to its port of destination, they are entitled to the freight. The Fortuna, 4 Rob. Adm. Rep. 278. 5 Rob. Adm. Rep. 67. But if the goods are not carried to their original destination, within the intention of the contracting parties, freight shall not be due or paid to the captors. This is the general rule, but it may admit of an exception. As where goods have been carried not to the port of destination, but to the country where the owner lives, and to which the proceeds were ultimately destined; but by the regulations of the country where the goods are shipped, they cannot be cleared out directly for the port of ultimate destination there, as the intention of the parties is completely effected in the manner they would have elected, if at perfect liberty so to do, freight has been adjudged to the captors. The Diana, 5 Rob. Adm. Rep. 67.

And if the cargo be not carried to the port of destination, no freight is due to the captors, although the cargo has been sold very advantageously in the port of the capturing power, to which she has been conveyed. Vrow Anna Catharina, 6 Rob. Adm. Rep. 269.

such circumstances; or, to state the question more correctly, whether he is bound to receive the goods [282] or is at liberty to abandon them for the freight.

For we have already seen, in the case of an *East-India* ship, that the company (the merchants) were held liable to pay the freight of a quantity of pepper delivered to, and received by them, although greatly damaged by a peril of the sea; and that the owners were not answerable for the expense incurred in endeavouring to remove the injury occasioned by the salt water (*g*). And in another case that will be mentioned hereafter, the merchant was held liable to pay the freight of tobacco, saved from shipwreck, and accepted by him, although part was so much damaged as to be of no value (*h*).

Upon this question as to the right of the merchant to abandon his goods when brought to the place of destination, and by so doing to discharge himself from the freight, different doctrines and opinions have prevailed, and there is no judicial decision in our books: although in some cases between the merchant and his insurer, it has been admitted that the freight was payable, notwithstanding the goods were so much damaged, that their value fell short of its amount (*i*). But it is necessary to distinguish the causes, from which the deterioration may have proceeded. If it have proceeded from the fault of the master or mariners, the merchant is entitled [283] to a compensation; and may recover it by an action at law against the owners or master;

(*g*) *Hotham & others v. East-India Comp.* Doug. 272. ante, ch. 1. of this part. sect. 14.

(*h*) *Lutwidge & another v. Grey & others*, post. sect. 13. of this chapter.

(*i*) *Boyfield v. Brown*, 2 Stra. 1065. and *Mason v. Skurry*, Park, 116. Marshall, 143.

but, if he has received the goods, he cannot insist upon the damage as a defence to such an action brought against himself for the freight, even although he has offered to return them (*k*). On the other hand, if it have proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of a ship; the merchant must bear the loss, and pay the freight; for the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event. And to this point there is a direct authority in the treatise called the *Guidon*. The author, having mentioned several cases of abandonment, as between the merchant and the insurer, goes on thus: "In like manner, the merchant cannot abandon the goods "herein before mentioned (*viz.* fruits, salt, corn, victuals, "&c.) to the master of the ship for his freight, if the "deterioration has proceeded from natural decay; or "from the great diminution of the price, that takes place "at the end of particular seasons, as in figs, "grapes, and herrings after Easter; or by rea- [284] "son of an over-abundant supply of the market, "as in corn, wine, or salt; although in salt a different "practice formerly prevailed, which is contrary to rea- "son, if the option has not been reserved by an express "clause in the charter-party" (*l*).

(*k*) *Milles & others v. Bainbridge & others*, Guildhall, Decm. 20th, 1804, before *Lord Ellenborough*, Ch. J. His Lordship intimated that if the merchants had refused to receive the cargo on the ground of damage so occasioned, the point would admit of some doubt. In such a case the merchant would derive no benefit whatever from the conveyance, nor would the master have fulfilled his engagement according to the terms of the bill of lading: *Quære*, therefore, whether the master could oblige the merchant to pay the freight? See *Barton v. Butter*, 7 East. 479.

(*l*) *Guidon*, chap. 7. art. 10.

In the very next article however of the treatise we find this doctrine: "If goods contained in casks, as "wine, oil, olives, molasses, and others of the like sort, "have leaked to such an extent, that the casks are "empty, or nearly empty, the merchant may abandon "them for the freight, before they are landed. There- "fore masters should take care when they receive casks, "to see that they be well hooped, and in good condi- "tion. It is true, that if by tempest the casks have "been so pressed that they have thrown out their bot- "toms, have been beaten in, and burst, provided there "have been no fault in the stowage, the loss shall be an "average against the insurers, the master shall lose his "freight" (*m*).

From the words of this article it appears very clearly, that, in the opinion of the author, the merchant might abandon articles of this description, although the leakage were not occasioned by peril of the sea.

In the work of *Molloy* (*n*) however we find the [285] following clause: "If freight be taken for 100 "tons of wine, and twenty of them leak out, "so that there is not above eight inches from the buge "upwards, yet the freight becomes due: one reason is, "because from that gage the King becomes entitled to "custom; but if they be under eight inches, by some "it is conceived to be then in the election of the freight- "ers to fling them up to the master for freight, and the "merchant is discharged. But most conceive other- "wise; for if all had leaked out (if there was no fault "in the master), there is no reason the ship should lose

(*m*) *Guidon*, chap. 7. art. 11.

(*n*) Book 2. c. 4. sect. 14. The author cites *Boyce v. Cole*, Hil. Ter. 26 and 27. *Car.* 2. in K. B. But I do not find that case reported elsewhere.

"her freight, for the freight arises from the tonnage "taken; and if the leakage was occasioned through "storm, the same perhaps may come into an average. "Besides, in *Bourdeaux* (*o*), the master stows not the "goods, but the particular officers appointed for that "purpose, *quod nota*. Perhaps a special convention "may alter the case."

The *French* Ordinance declares: "That the mer- "chant shall not oblige the master to take for his freight, "goods diminished in price, spoilt, or deteriorated, by "their own vice, or by peril of the sea (*p*)." And the very next article is as follows: "if goods put into "casks, as wine, oil, honey, and other liquors, have "leaked out to such an extent, that the casks are empty, "or nearly empty, the merchant may abandon "them for the freight." *Valin*, in his com- [286] mentary on this last article, observes, that it is taken from the article of the *Guidon*, which I have just before quoted. He observes also that by the *Consolato del mare*, *chap.* 202, the contrary is decided: yet that by another article of the same code, *chap.* 234, freight is not due for pottery, unless it be found entire at the end of the voyage (*q*), and he considers this article of the Ordinance, to give the right of abandonment to the merchant, in the case of leakage happening as well from the fault of the casks as from the perils of the sea, and to be an exception to the general rule laid down in the article immediately preceding. On the

(*o*) See *Cleirac* on the 11th art. of the laws of *Oleron*.

(*p*) *French Ordinance*, liv. 3. tit. 3. *fret.* art. 25 & 26.

(*q*) The sense of this chapter appears not to be correctly stated by the learned commentator: the rule therein laid down is, that if the merchant stows the pottery he must pay the freight of what is broken; but if the master stows it, he is at all events to lose the freight of what is broken; and if there has been any fault in the stowage or carriage, he must also make good the damage.

other hand his countryman *Pothier*, controverts this opinion, and contends that the article of the Ordinance is to be confined to the case of leakage occasioned by peril of the sea; in which case he considers the real commodity, *viz.* the contents of the casks to be absolutely lost, as much as if they had been washed overboard. "This opinion of *Monsieur Valin*," says he, "appears to me to be contrary to principles. It is the "fault of the merchant, if he has put his goods into "bad casks: It is *his* fault if they have leaked out, and "have not arrived at the place of destination; he there-"fore ought to pay their freight; for according "to the principles of the contract of hiring, the [287] "hirer, who by his own act or fault has not en-"joyed the thing let to him, ought to pay the hire, as if "he had enjoyed it. If the letter, who has been prevent-"ed from letting to other persons the part of his vessel "occupied by the bad casks, should not be paid the "freight, he would suffer for the fault of the hirer; "which is unjust (*r*)."

This argument of *Pothier* may shew what *ought* to have been established by the Ordinance, but it by no means proves that the interpretation given by *Valin* and which agrees with the terms of the *Guidon*, is not the true interpretation. The rule was probably introduced in early times, to prevent disputes and litigation; and adopted by the framers of the *French* Ordinance for the same reason (*s*).

(*r*) *Traite de Charte-partie*, num. 60.

(*s*) The Ordinance of *Rotterdam* on this subject seems to agree with the *general* rule of the *French* Ordinance. It declares that when the goods are arrived at the intended place, the merchant is obliged to pay the freight of what happens to be damaged or diminished without any fault of the master or ship's crew. *Art.* 155. 2 *Magens*, 105.

In our *West-India* trade, the freight of sugar and molasses is regulated by the weight of the casks at the port of delivery here, which in fact is, in every instance less than the weight at the time of the shipment, and therefore the loss of freight occasioned by the leakage necessarily falls upon the owners of the ship by the nature of the contract (1).

Upon the propriety also of the rule laid down in the preceding article of this Ordinance, namely, that which prohibits abandonment generally, these [288] two learned foreigners have differed in opinion, "It must be agreed," says *Valin*, "that this rule is too "rigorous to be compatible with equity. The natural "idea, that the mind forms of the agreement for freight,

(1) The question as to the effect of leakage occasioned by perils of the seas on freight, was discussed and settled in Frith v. Barker, 2 John. Rep. 327. One hundred and ninety hogsheads of sugar were shipped from Surrinam to New-York, and in consequence of tempestuous weather, fifty of the hogsheads were washed out and arrived empty. Freight was claimed for these fifty hogsheads; and the Court held that none was due. Chief Justice Kent said, I consider these hogsheads as having perished by the perils of the seas; no freight is due for goods, which perish during the course of the voyage. And however the authorities may differ on the assumed right to abandon damaged goods in discharge of freight, yet they all agree that you may abandon casks leaked out by the perils of the seas, as the subject matter of the contract no longer exists. This opinion will not apply to the case of an article that is lost by other causes than the perils of the sea, such as internal decay, leakage, evaporation or the like. See post, 292. note. 3 John. Rep. 321.

" is, that it has for its object that the goods shipped in " pursuance of it shall be the only pledge for the freight, " and consequently that upon the same goods alone can " the payment of the freight be enforced. From whence " it follows, that in every case (*en quelque cas que ce " soit*) the merchant ought to be quit of the freight by " abandoning his goods. This is also the opinion of " *Casa Regis, Disc.* 22. n. 46. and *Disc.* 23. n. 86. and " 87. In the case of *shipwreck* it is decided by the " Ordinance, that the freight is not due when the goods " are lost; now when the goods are so injured by the " shipwreck, that he, to whom they belong, cannot de- " rive from them wherewith to pay the freight, is it not " the same to him as if they had been wholly lost by the " mere act of shipwreck? If then he had not the power " of abandoning the goods to discharge himself from " the payment of the freight, his condition would be " worse than if all had perished without resource, and " this is what natural equity will not allow him to suffer." The learned commentator then proceeds to acquaint us, that a practice prevailed in his country, of not compelling the merchant to reclaim shipwrecked goods, and that unless he reclaimed them, the master was never [289] known to obtain the payment of the freight.

On the other hand *Pothier* (*t*), speaking of this article of the Ordinance of his country, says, " This " rule, notwithstanding what is said of it by *Monsieur* " *Valin*, is just, and conformable to the principles of the " contract of letting to hire. It is sufficient, according " to these principles, to make the whole hire due to the " letter, that he has wholly performed the obligation, " which he contracted, to give to the hirer the enjoy-

(*t*) *Ch. partie*, num. 59.

" ment of the thing let to hire: now the master having " transported the goods to their place of destination, it " may be truly said, that he has wholly fulfilled his ob- " ligation, and that he has given to the merchant the " enjoyment of the ship for the use, for which he had " let it to him, since this transport was the only use, for " which they contracted. If the goods are found greatly " damaged and of no value, this is a matter that does " not concern the master, because it is by an accident, " against which he does not warrant, that they are re- " duced to this condition. The point of *Monsieur Va-* " *lin's* objection," proceeds he, " is, that it is the same " thing to the merchant, whether the goods are abso " lutely lost or become of no value. The answer is, " that it is on the side of the master, that we ought to " consider whether this is the same thing: now it is ev- " ident that this is not the same thing to the master. " For when the goods are lost on the way, not " having been able to transport them to the [290] " place of destination, he has not fulfilled the " object of his contract, *munere vehendi functus non est:* " and it is for this reason that the freight is not due to " him: but when he has transported them, however in- " jured they may be found, he has fulfilled the object of " his contract, *munere vehendi functus est*, and by con- " sequence the freight is due to him (*u*)."

In addition to this answer given by *Pothier* it may be proper also to observe, that the argument of *Valin* seems to prove too much; for if the goods are to be the only security for the freight, and the merchant ought not to pay the freight, if they are not worth the amount of it, the master and owners must lose the freight, if the goods

(*u*) Pothier *Charte-partie*, num. 59.

happen from any accident to come to a bad market; which is contrary to all law and reason: and further, that the foundation of the argument does not apply to this country, by the law of which, although the goods are pledged for the freight, yet the merchant also is personally responsible for it.

3. I have detailed the opinions of these learned foreigners thus at length, because they appear to me to comprize the whole argument on both sides of the question, which, as I have before observed, has not received a judicial decision in this country. It is true indeed, that *Lord Mansfield* in a case, that will be more fully stated hereafter, delivered himself to the following [291] effect: "As to the value of the goods it is "nothing to the master, whether the goods "are spoiled or not, provided the merchant takes them; "it is enough if the master has carried them; for by "doing so, he has earned his freight; and the mer- "chant shall be obliged to take all, that are saved, or "none; he shall not take some, and abandon the rest, "and so pick and chuse what he likes, taking that, "which is not damaged, and leaving that, which is "spoiled or damaged. If he abandons he is excused "freight, and he may abandon all, though they are not "all lost." But it is to be observed, that the question of abandonment was not the point in issue in that cause; and in fact in that case the goods had *not* been carried to the place of destination, but the vessel, which was bound for *Lisbon*, had been captured and re-captured, and was carried with the goods into a port in *Devonshire* where the merchant received them: and therefore if *Lord Mansfield* is to be understood to speak with reference to the case then before him, the sentiments deliver-

ed by him on that occasion, cannot be considered as furnishing an authority for the decision of the question in the case of goods actually carried to the place of destination. It is true also, that in the case of *Lutwidge v. Grey & others*, which will be fully cited for another purpose in the subsequent part of this chapter (*v*), it seems to have been taken for granted, by the counsel on both sides, that the merchants might [292] have abandoned the whole cargo; but in that case the ship was wrecked, and the goods saved at a great expense, at a place short of the port of delivery, and the right of abandonment is spoken of with reference to the situation of the goods at that place. Most certainly the merchant cannot be compelled to accept his goods at any other place than the place of destination: even if the master should pay the salvage, and convey them to that place, the merchant may be allowed to have his option of accepting them or not, loaded with the additional expense of salvage. And accordingly in another case, *Lord Mansfield* said, "The owner of "the ship has a lien for freight, but in a total loss, lit- "erally so called, no freight is due; in case of a loss, "total in its nature, with salvage, the merchant may "either take the part saved, or abandon." (*w*) The only point intended to be proposed by me as doubtful, is the right to abandon for the freight alone, at the port of destination: and in point of practice, I have been informed that this right is never claimed in this country (1).

(*v*) Sect. 13. p. 298.
(*w*) *Baillie v. Moudigliani*, Park, chap. 2. p. 53.

(1) This point has received a judicial decision in the State of New-York, in the case of Griswold v. New-York Insurance

9. Having thus considered the cases, in which the entire freight is to be paid according to the agreement, I now proceed to the consideration of those, in which *a part* only of the stipulated sum may be claim-
[293] ed. And these are, *first*, when the ship has performed the whole voyage, but has brought a part only of the merchant's goods in safety to the place of destination: And, *secondly*, when the ship has not performed the whole voyage, but the master has delivered the goods to the merchant, at a place short of the port of destination. In the case of a general ship, or of a ship chartered for freight to be paid according to the quantity of the goods, there can be no doubt that

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Company, 3 John. Rep. 321., where the court after commenting on the authorities cited by Abbot, held that when goods are carried to the port of destination, though spoiled so as to be of no value to the owner, the owner cannot abandon the goods for the freight, but the master is entitled to his full freight. Chief Justice Kent said, "the ship-owner performs his engagement when he carries and delivers the goods. The condition which was to precede payment, is then fulfilled. The right to payment then becomes absolute, and whether we consider the spirit of this particular contract, or compare it with the common law doctrine of carrying for hire, we cannot discover a principle which makes the carrier the insurer of the goods as to their soundness, any more than he is of the price in the market to which they are carried. If he has conducted himself with fidelity and vigilance in the course of the voyage, he has no concern with the diminution of the value. It may impair the remedy which his lien afforded, but it cannot affect his personal demand against the shipper." See also the opinion of Justice Livingston in the same case on a former trial, 1 John. Rep. 205.

freight is due for so much as shall be delivered. The contract in these cases being distinct, or at least divisible in its own nature. But suppose a ship chartered at a specific sum for the voyage, without relation to the quantity of the goods, (in which case the contract, as observed by *Lord Chancellor Hardwicke* (*x*), is more properly a contract for the use of the ship, than for the conveyance of the merchandize,) should lose part of her cargo by a peril of the sea, but convey the residue to the place of destination; in this case I do not find any authority for apportioning the freight. And it seems to have been the opinion of *Malyne* (*y*) that nothing would be due; and the case of *Bright v. Cowper*, which will be mentioned hereafter, may be considered as an authority in support of that opinion. But probably if the question should arise again, the determination of it would depend upon the particular words of the charter-party; for without a very precise agreement for that purpose, it seems hard that the owners [294] should lose the whole benefit of the voyage, where the object of it has been in part performed, and no blame is imputable to them (1).

10. The apportionment of freight usually happens, when the ship by reason of any disaster goes into a port

(*x*) In the case of *Paul v. Birch*, 2 Atkins, 621, *ante*, ch. 1. of this part. sect. 7.

(*y*) *Malyne's Lex. Mercat.* p. 100.

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(1) In Post v. Robertson, 1 John. Rep. 24., the court held that where the ship is chartered for a specific sum for the voyage, the general rule is, that if part of the cargo be lost by the perils of the sea, and part conveyed to the place of destination, there can be no apportionment of the freight under the charter-party.

short of the place of destination, and is unable to prosecute and complete the voyage. In this case we have already seen that the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight: but if he is unable, or if he declines to do this, and the goods are there received by the merchant, the general rule of the maritime law is, that freight shall be paid according to the proportion of the voyage performed, *pro ratâ itineris peracti* (*z*).

Some writers (*a*) have endeavoured to trace this rule to the *Digest* of *Justinian*, but the passages referred to by them, do not appear to contain such a regulation. The rule however is without doubt extremely ancient. It is to be found in the collection of laws called the *Rhodian Laws* (*b*), but which collection is now generally agreed to be of a later date than the time of *Justinian* (*c*); and also in the *Consolato del mare* (*d*).

[295] The rule, as laid down in the laws of *Oleron* (*e*), is to the following effect. If a ship depart with a cargo from *Bourdeaux*, or other place, and it happens that the ship is disabled, and as much of the cargo is saved as possible, the merchants and master enter into a great debate, and the merchants demand to have their goods of the master, they may have them, upon paying of freight for so much of the voyage as the ship has advanced rateably and in proportion, if the master pleases;

(*z*) The Ordinance of *Rotterdam* differs in this respect from the general rule; for it allows the merchant to take his goods, paying a reasonable portion of the freight, in case the ship *may* be repaired in a short time. art. 147. 2 *Magens*, 104.

(*a*) *Roccus* not. 81.

(*b*) Per *Lord Mansfield* in *Luke v. Lyde*, 2 Burr. 889.

(*c*) *Schomberg's* dissertation on these laws. The only rule, that can be distinctly and authoritatively traced to the institutions of *Rhodes*, is the law *de Jactu*, quoted and adopted in the *Dig.* 14. 2. 1. See the *eighth* chapter of this part, sect. 2.

(*d*) Per *Lord Mansfield* in *Luke v. Lyde*, 2 Burr. 889.

(*e*) Art. 4. and see Ordin. of *Wisbuy*, art. 16. 37.

but if the master will, he may repair his ship, if he can do it speedily, and if not, he may hire another ship to complete the voyage, and shall have his freight of the goods to be reckoned according to thier proportion to the whole cargo: and the goods shall pay the costs of their salvage. The rule is also to be found in *Roccus* (*f*), (who cites several more ancient authors in support of it,) and in all the subsequent writers on maritime law: and is adopted in most of the foreign ordinances, particularly in the *French* Ordinance (*g*); which declares, that "the master shall be paid the freight of goods saved "from ship-wreck, if he conveys them to the place of "destination. If he cannot find a vessel to convey the "goods saved, he shall be paid freight in pro- "portion only to the voyage performed" (1). [296]

11. With regard to capture and ransom, the author of the *Guidon*, speaking of the case where the

(*f*) *Loc. sup. cit.*
(*g*) Liv. 3. tit. 3, *fret.* art. 21 & 22. *See also* art. 11.

(1) In Robinson v. Marine Insurance Company, 2 John. Rep. 323., the Court said it is now too late to deny or disregard the rule that freight pro rata itineris is due, when a ship by reason of perils goes in to a port short of her destination, and is unable to prosecute her voyage, and the goods are received by the owner *at such intermediate port.* The general doctrine is recognized in Williams v. Smith, 2 Cain. Rep. 13. United Insurance Company v. Lenox, 1 John. Cas. 377. Scott v. Libby, 2 John. Rep. 336. Dorr v. N. England Mar. Insurance Company, 4 Mass. Rep. under p. 231. Hooe v. Mason, 1 Wash. Rep. 207. Pinto v. Atwater, 1 Day's Rep. 193. See also Mulloy v. Barker, 5 East. Rep. 316.

goods only are taken by pirates and the ship discharged, and the goods are afterwards ransomed, says, that "If "the master will not contribute to the ransom, he shall "lose his whole freight; but if he contributes, he shall "be paid freight as far as the place of the capture, as "well in the case of affreightment by charter-party, as "otherwise: and if he furnishes another ship, to relade

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But if the ship by reason of the perils of the sea be compelled after the commencement of her voyage to return to *the port of lading*, and the merchant there receives his goods no freight is due. Griswold v. New-York Insurance Company, 1 John. Rep. 205. S. C. 3 John. Rep. 321. And if in such case the master would entitle himself to any freight, he must either transport or offer to transport the goods, however damaged, to the port of destination, and if the merchant refuses, an action for damages lies, id. ibid. So if the ship be captured and recaptured and brought back to the port or *quasi* port of her departure, no freight *pro rata* is due. The Hiram, 3 Rob. Adm. Rep. 180., recognized in Scott v. Libby, 2 John. Rep. 336. See also as to the point of no freight being due when ship is abandoned at sea, and is afterwards brought into her port of destination. Dunnell v. Tomhagen, 3 John. Rep. 154. See also Liddard v. Lopes, 10 East. 526. cited post, p. 322.

In case of a freight earned *pro rata*, the best rule to ascertain the amount is to consider what portion of the voyage has been performed, not when the ship encountered the peril and was interrupted in her course, but when the goods had arrived at the intermediate port, because that is the extent of the voyage performed, as it respects the interest of the shipper. So held in Marine Insurance Company v. Lenox, cited in 2 John. Rep. 326. But if that does not appear, the rule adopted in Luke v. Lyde, by Lord Mansfield is the general guide. Robinson v. Marine Insurance Company, 2 John. Rep. 323.

"the goods, he shall be paid his whole freight" (*h*). Upon this subject the *French* Ordinance provides, "that if the ship and goods are ransomed, the master "shall be paid his freight as far as the place of capture, "even his whole freight, if he conveys the goods to the "place of destination, he contributing to the ransom" (*i*). Although ransom is now prohibited by the law of *England*, yet this doctrine may apply to the case of capture and recapture: and accordingly in an action brought by a seaman for his wages, in the case of a ship taken and retaken, and which reached the port of destination (*k*). *Lord Eldon*, before whom the cause was tried, held that the wages were payable, because, said his Lordship, "*the ship on her arrival was entitled to* [297] "*freight*" (*l*).

12. Upon this subject of the apportionment of freight, *Malyne* says, "If the ship in her voyage become un- "able without the master's fault, or that the master or "ship be arrested by some authority of magistrates in "her way, the master may either mend his ship, or "freight another. But in case the merchant agree not "thereunto, then the master shall at least recover his "freight, so far as he hath deserved it" (*m*). The same author also mentions the following case: A merchant took a ship to freight, and put in the master and mariners, and victualled the ship at his own expense, and by a charter-party engaged to pay the owner for the use of the ship and furniture 20*l.* every month at her return into the river *Thames*. The merchant laded

(*h*) *Guidon*, Chap. 6. art. 7.
(*i*) Liv. 3. tit. 3. *fret.* art. 19.
(*k*) *Bergstrom v. Mills*, *West.* Sit. in Mich. Term, 40 *Geo.* 3. 3 Espin. N. P. cases, p. 36.
(*l*) See before sect. 1. of this chapter.
(*m*) *Malyne*, p. 98. and post, 314. sect. 19.

the ship for the *Streights*, and to go from port to port and to several places with merchandize; and after about two years, the ship, having taken in a cargo at *Barbary*, was, on her return to *London*, cast away by tempest near *Dover;* and the goods were saved; the merchant refused to pay the freight, because the ship did not arrive in the river *Thames*, according to the words of the charter-party: "Herein," says the author, "the owner was much wronged, for the money is due "monthly, and the place was named only to signify the "time, when the money was due to be paid;" [298] but he does not inform us whether the question was ever brought before a court of justice, or whether or no the merchant finally paid any part of the freight (*n*).

13. Upon this subject, I have been able to collect only the following decisions.

Lutwidge, the owner of a ship called the *Wharton* of *Whitehaven*, let his ship by a charter-party to *Archibald Grey* and others, merchants at *Glascow*, for a voyage from *Glascow* to *Maryland* or *Virginia*, and back from thence to *Glascow*, and was to receive freight from them for the homeward cargo only, at the rate of 8*l*. 12*s*. per ton of tobacco, computing four hogsheads to the ton; one half to be paid immediately after the ship's discharge at *Glascow*, and the other half within six months after such discharge. The ship sailed to *Virginia*, and there delivered her outward cargo, and took on board from the merchant's factor a cargo of tobacco consisting of 199 hogsheads, part of which was their property, the residue belonged to other persons, and was put on board by the factor to complete

(*n*) *Malyne*, p. 101.

the lading, in pursuance of directions given to him for that purpose by his principals, in case the outward cargo should not enable him to purchase a full lading on their account. *Grey and Co.* insured their part of the cargo with persons living at *Bristol*, the other part was not insured. On the return homeward, the ship was unfortunately cast away at *Youghall* in [299] *Ireland*, which is within a very short distance of *Glascow*, and part of the cargo to the amount of 163 hogsheads was saved by the assistance of the officers of the customs at *Youghall*, and deposited in the custom-house there. *Lutwidge* the owner, as soon as he knew of the misfortune, informed *Grey & Co.* of it, and told them he should provide another ship to transport the tobacco which was saved. *Grey & Co.* abandoned their part of the cargo to their insurers, and indorsed over the bills of lading to them. *Lutwidge* provided another ship at *Youghall*, but the insurers took the part of the cargo abandoned to them, and conveyed it to *Bristol*. The agent of the proprietors of the other part of the cargo was willing to have laded it on board the ship thus provided, if the master thereof would sign bills of lading to deliver it at *Glascow* in conformity with the original charter-party; but the master refused to give such bills of lading, or to oblige himself to deliver it at *Glascow*, offering only to give receipts obliging himself to deliver it in *Great Britain*. And the agent suspecting that he meant to take it to *Whitehaven*, and not to *Glascow*, refused to deliver it to him upon those terms, and sent it by another vessel to *Glascow*, where several hogsheads were found so much damaged, that they were not entered at the custom-house, but burned at the king's scales there. *Lutwidge* brought

an action against *Grey & others*, for his freight according to the charter-party, in the Court of Admi-
[300] ralty in *Scotland*. On their part it was insisted, that the contract of affreightment was dissolved by the shipwreck, and that there remained only a demand in equity for freight; that the demand could not be made against *them*, who had not taken the goods into their possession, but must be made, for part against the insurers at *Bristol*, and for the residue against the proprietors of that residue; that this demand could only be in proportion to the value of the goods saved, after deduction of salvage and charges: and that at all events it could only be for the proportion of the voyage to *Youghall*, because the master of the ship refused to sign bills of lading, and engage to deliver the tobacco at *Glascow*. The Judge of the Court of Admiralty decreed, that the full freight was due from *Grey & Co.* for the part of the cargo saved, but none for the part lost, and that the full freight was due, although the goods were not carried to *Glascow*, because *Lutwidge* had another ship ready to transport them thither, and there was no occasion for any new bills of lading, while the former bills of lading subsisted. From this judgment, *Grey & Co.* appealed to the Lords of Session in *Scotland*, who by their interlocutor decreed, "That the "contract of affreightment was dissolved by the total "loss of the ship, albeit some of the shipwreck goods "were saved out of the shipwreck; and found that the "freighters indorsing the bills of lading to the insurers "did not subject the freighters to any freight for the
"goods recovered by the insurers, but found the
[301] "merchants liable to the freight *pro ratâ itineris*
"of such of the goods as were brought to *Glas-*

"*cow*, notwithstanding some of the tobacco was found "damnified, and burned there." This decree or interlocutor was, upon the petition of *Lutwidge*, reviewed by the Lords of Session, but affirmed by them. Hereupon *Lutwidge* appealed to the highest tribunal of the country, the *British House of Lords:* the House of Lords "Reversed the decree or interlocutor of the Lords of "Session, complained of by the appellant, and the affirm-"ance of that interlocutor; and declared, that the res-"pondents, *Grey & others*, were liable for the full "freight of such of the goods as were given up to the "insurers, and for the freight *pro ratâ itineris* of such "of the goods as were brought to *Glascow*, notwith-"standing some of the tobacco were found damnified "and burned there" (*o*).

14. This rule of the maritime law, which directs the payment of freight according to the proportion of the voyage performed, was fully recognized, and adopted, in the Court of King's Bench, in a case that happened soon after *Lord Mansfield* presided in that Court. The cause had been tried before his Lordship [302] in the country, and he appears to have paid peculiar attention to the decision. "I was desirous," said "his Lordship, "to have the point reserved for the opin-"ion of the Court, in order to settle it more deliberate-"ly, solemnly, and notoriously; as it is of so extensive "a nature, and especially as the maritime law is not "the law of a particular country, but the general law of

(*o*) *Lutwidge & another v. Grey & others*, determined in the House of Lords, 23 *February*, 1733. The account here given is taken from the printed cases delivered by both parties to the House of Lords. The judgment of the House of Lords will be found in the printed journals of the year, p. 356. The case is cited in the case of *Luke v Lyde*, both at the bar and by *Lord Mansfield*, who was one of the counsel for the appellant.

"nations: non erit alia lex Romæ, alia Athenis; alia "nunc, alia posthac; sed et apud omnes gentes et omni "tempore una eademque lex obtinebit." The facts of the case were these: *Lyde* shipped a cargo of 1501 quintals of fish at *Newfoundland*, on board the ship *Sarah*, belonging to *Luke & others*, to be carried to *Lisbon:* the freight was to be at the rate of *two shillings* per quintal. The price of the cargo at *Newfoundland* was *ten shillings and sixpence* per quintal. *Luke & others* also had on board a quantity of fish, their own property. The ship set sail on the 27th *November* 1756, and having proceeded *seventeen* days on her voyage, was taken on the 14th of *December* by a French ship within *four* days sail of *Lisbon*, but retaken on the 17th of *December* by an English privateer, and brought on the 29th into the port of *Biddeford* in *Devonshire*. The French ship took out the master and all the crew, except one man and a boy. *Lyde* took his goods of the recaptors, and paid *five shillings* per quintal salvage, the value of the fish being then estimated at *ten shillings* per [303] quintal. The fish could not be sold at all at *Biddeford*, nor at any other port in *England* for more than *ten shillings* per quintal, clear of charges and expenses; and it was supposed by every person that the fish would be disposed of to the greatest advantage at *Bilboa* in *Spain*, to which place *Lyde* sent it without delay; but it fetched there only *five shillings and sixpence* per quintal, clear of freight and expenses, being little more than one-third of the prime cost and salvage. The freight from *Biddeford* to *Lisbon* was higher than from *Newfoundland* to *Lisbon*. The owners *Luke & others* abandoned the ship to their insurers, and never offered to convey the goods to *Lisbon*, nor were ever

required to do so by *Lyde* the merchant. In an action brought by the owners *Luke & others* for freight, the Court decided, that they should recover freight, as for half the quantity of the cargo shipped, considering the other half to be absolutely lost by the expense of salvage, and in the proportion of *seventeen* days, during which the ship had proceeded on the voyage, to *twenty-one* days, within which the voyage would have been completed, if the capture had not happened, that is 60*l.* 14*s.* being $\frac{17}{21}$ of 75*l.* the half of 150*l.* And *Lord Mansfield* said, "If a freighted ship becomes acci-"dentally disabled on its voyage, without the fault of "the master, the master has his option of two things: "either to refit it, (if that can be done within convenient "time,) or to hire another ship to carry the goods to "the port of delivery. If the merchant disa-"grees to this, and will not let him do so, the [304] "master will be entitled to the *whole* freight of "the *full* voyage; and so it was determined in the "House of Lords in the case of *Lutwidge & How v.* "*Grey et al.* As to the value of the goods, it is noth-ing to the master of the ship, whether the goods are "spoiled or not, provided the freighter takes them; it "is enough if the master has carried them; for by doing "so, he has earned his freight: and the merchant shall "be obliged to take all that are saved, or none; he "shall not take some and abandon the rest, and so "pick and choose what he likes, taking that, which is "not damaged, and leaving that, which is spoiled or "damaged. If he abandons *all*, he is excused freight: "and he may abandon *all*, though they are not *all* lost. "(I call the freighter the merchant, and the other the

"master, for the clearer distinction.) Now here is a "capture without any fault of the master, and then a "recapture; the merchant does not abandon, but takes "the goods, and does not require the master to carry "them to *Lisbon*, the port of delivery. Indeed the "master could not carry them in the same ship, for it "was disabled, and was itself abandoned to the insurers "of it; and he would not desire to find another, be- "cause the freight was higher from *Biddeford* to *Lisbon*, "than from *Newfoundland* to *Lisbon*. There can be no "doubt but that *some* freight is due; for the goods "were not abandoned by the freighter, but re-
[305] "ceived by him of the re-captor. The ques- "tion will be, *what* freight? The answer is, a "*rateable* freight; *i. e. pro ratâ itineris.*"

"If the master has his election to provide another "ship to carry the goods to the port of delivery, and the "merchant does not even desire him to do so, the mas- "ter is still entitled to a proportion, *pro ratâ*, of the "former part of the voyage. I take the proportion of "the salvage here to be half of the whole cargo upon "the state of the case, as here agreed upon. And it is "reasonable that the half here paid to the recaptor "should be considered as *lost*. For the re-captor was "not obliged to agree to a valuation, but he might have "had the goods actually sold, if he had so pleased, and "taken half the produce, and therefore the half of them "are as much lost, as if they remained in the enemy's "hands. So that half of the goods must be considered "as *lost*, and half as *saved*. Here the master had come "*seventeen* days of his voyage, and was within *four* days "of the destined port, when the accident happened. "Therefore he ought to be paid his freight for $\frac{17}{21}$ parts

"of the full voyage, for that half of the cargo which "was saved." His Lordship then proceeds to cite most of the authorities that I have already quoted on this subject, and concludes thus: "It is quite immaterial "what the merchant made of the goods afterwards, for "the master hath nothing at all to do with the goodness "or badness of the market; nor indeed can "that be properly known, till after the freight [306] "is paid; for the master is not bound to deliv- "er the goods till after he is paid his freight. No sort "of notice was taken of that matter in the case of "*Lutwidge & How v. Grey*, in the House of Lords; "and yet there the tobacco was damaged, very greatly "even so much that a great part of it was burnt at the "scales at *Glascow*" (*p*). (1)

(*p*) *Luke & another v. Lyde*, 2 Burr. 882. *and* 1 Black. Rep. 190.

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(1) The authority of the case of Luke v. Lyde has been several times questioned. It is evident that it did not meet with the approbation of Lord Kenyon in Cook v. Jennings, p. 308. sect. 16. And it is reluctantly admitted by the Court in Mulloy v. Backer, 5 East. Rep. 316., where Lord Ellenborough said, when a case like Luke v. Lyde shall occur, in deference to the authority of those who decided, we should most likely adopt the same rule. But if this were a case of a contract to be decided only according to the law of England, without adverting to any rule of the marine law, the plaintiff would not be entitled to recover a *pro rata* freight. See also Liddard v. Lopes, 10 East. Rep. 526.

And in Post v. Robertson, 1 John. Rep. 24. Mr. Justice Livingston expressed his unqualified disapprobation of the decision. What, said he, have the Rhodian laws, or the regulations in the Consolato del mare, or the laws of Wisbuy or the ordinances

15. In a subsequent case, a ship sailed with goods from *Nevis* for *Bristol*, but on the voyage was taken and carried into *France*, and condemned there. On appeal the sentence of condemnation was reversed, and restitution awarded, but before that time the ship and cargo were sold. The merchants received the price of the goods, and paid freight to the master *pro ratâ itineris:* and, having caused the goods to be insured before the commencement of the voyage, brought an action against the insurers to recover from them the freight so paid to the master. The Court held that this payment could not be recovered upon this insurance. But *Lord Mansfield* said, "As between the owners of the ship and cargo in

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of Lewis 14th, on which Lord Mansfield so much relied, to do with a plain and positive agreement between two merchants. They had a right notwithstanding all such regulations, (*which if examined will not be found to support the doctrine laid down in Luke v. Lyde*) to agree that no freight should be paid but on a completion of the voyage and delivery of the cargo. To interpret a charter-party made between two British subjects by French ordinances, or by the municipal regulations of any other state, is not less extravagant than it would be, in the parliament of Paris, to declare a contract made in France and valid by her laws, null and void because the parties had not conformed to the English statute for the prevention of frauds and perjuries. If an agreement contravene no law of the state whereof the parties are subject and where it is made, that alone should be a guide in ascertaining their respective rights. The regulation of freight is as much an affair of municipal interference and of private contract as any other. There is no such thing as a law of nations on the subject; for every power legislates on this, as well as on other matters, as it thinks best.

" case of a total loss no freight is due, but as between " them no loss is total, where part of the property is " saved, and the merchant takes it to his own use. In " this case the value of the goods was restored " in money, which is the same as the goods, [307] " *and therefore freight was certainly due pro* " *ratâ itineris*" (*q*). (1)

(*q*) *Baillie v. Moudigliani*, Park, chap. 2. p. 53.

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(1) But where a ship was captured and recaptured, and was afterwards wrecked; and the master applied to the Vice-Admiralty Court at St. Kitts for a survey, and upon which the ship was condemned, and together with the cargo, at the petition of the master, was sold by order of the Court, and the proceeds of the sales were remitted to the owner of the ship, it was held that no freight was due; that the act of the master in procuring the sale was tortious, although done *bona fide* for the benefit of all concerned, because he has no authority over the cargo to this effect; that the cargo was prevented from arriving at the port of destination, not by inevitable casualty or superior power, but by the mere tortious act of the agent of the owner; and therefore the case was clearly distinguishable from that of Baillie v. Moudigliani. In the latter case the sale was made by authority of a competent tribunal, without any application of the master, and without any fault of the owner. But it would seem that the Court were not altogether satisfied with the decision of Lord Mansfield. Lord Ellenborough said, if the ship be disabled from completing her voyage, the owner may still entitle himself to the whole freight by forwarding the goods by some other means to the port of destination; unless the forwarding of them be dispensed with, or unless there be some new bargain upon this subject. If the ship-owner will not forward them, the freighter is entitled to them without pay-

So where a ship under a neutral flag, and with neutral papers, was in time of war driven into a *British* port by stress of weather, and seized together with the cargo, and libelled in the Court of Amiralty for condemnation, on account of various circumstances, which led to a suspicion that both ship and cargo were the real property of the enemy: and the neutrality of the cargo being proved before proof of the neutrality of the ship

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ing any thing. Hunter v. Prinsep, 10 East. Rep. 378. See ante, p. 272. note. The Hoffnung, 6 Rob. Adm. Rep. 231. See next note, below, and Roccus de nav. note 80.

But if the proceeds of the captured cargo have never actually come to the hands of the shipper, although restoration be decreed by the Court of Admiralty, the owner is not compellable to pay any freight. Barker v. Cheviot, 2 John. Rep. 352.

Nor can freight *pro rata* be recovered pending process in the Admiralty Court. For the ship may be condemned and the freight adjudged to the captors. And *passage* money seems to every purpose, except of *lien*, the same as freight. Mulloy v. Backer, 5 East. Rep. 516. In this case the plaintiff contracted to carry the defendant and his family and luggage, from Demerara to Flushing, &c. for 2400 guilders. War having been declared against Holland the ship was captured and carried into Plymouth, where the defendant and his family with their luggage, were set at liberty. As the process was yet pending against the ship in the Admiralty Court, the Court held that the action for a *pro rata* freight was brought too soon. And they said that passage money would follow the title of the ship as freight; but they intimated that probably *pro rata* passage money might be due. But in Howland v. Ship Lavinia, 1 Peters. Adm. Rep. 125. Judge Peters held that no *pro rata* passage money would become due in such a case, and if it had been advanced that it ought to be refunded.

arrived, the cargo was restored during the detention of the ship, and part thereof was sent in other vessels to the place of destination and the residue conveyed to *London*: The present Judge of the Court of Admiralty, after having decreed the restoration of the ship, decreed also that the merchants should pay freight for their goods for the portion of the voyage performed (*r*).(1)

15. *b*. On the other hand, in the case of a *Swedish* ship, which, being chartered to go from *Plymouth* to *Radstow*, (a very small distance) there to take a cargo of pilchards for *Venice*, sailed to *Radstow*, and took in the cargo, and proceeded a few days on the voyage; but meeting with bad weather and becoming leaky, returned to *Falmouth*, and was there stopped by an embargo imposed on the vessels of *Sweden*, in consequence whereof the cargo was taken out and restored to the merchants, who were *British* subjects; the learned Judge of the Court of Admiralty decreed [308] that *no* freight was due; but held that if any expenses had been incurred by the ship on account of the cargo, they must be paid (*s*). (2)

(*r*) The COPENHAGEN, *Mening*, 1 Rob. A. R. 289.

(*s*) The ISABELLA JACOBINA, *Sovergren*, 4 Rob. A. R. 77.

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(1) See ante 272. note. The Hoffnung, 6 Rob. Adm. Rep. 231., where the Court held that where a ship had been captured, and her cargo unlivered by order of court, that the whole freight was due, and the master was not obliged afterwards to proceed further on the voyage.

(2) So where a Swedish Ship was brought in under the embargo on a voyage from Philadelphia to Lisbon, and it became necessary to unliver the cargo which was claimed for mer

16. Neither of the authors by whom the preceding case of *Luke v. Lyde* is reported, have mentioned the form of action adopted by the plaintiff *Luke* to enforce his demand. In a case since decided in the Court of King's Bench, it was understood to have been an action for freight for the carriage of goods generally, and not an action founded on the original contract for the conveyance of the goods from *Newfoundland* to *Lisbon*. And so it really was (*t*). The case, to which I at present allude, is that of *Cook v. Jennings* (*u*), which was an action of covenant on a charter-party of affreightment dated 2d *August* 1796, by which the plaintiff let his ship the *Resolution* to the defendant, to freight from *Liverpool* to *Wyburgh*, and back to *Liverpool*, and agreed that the master should take on board a cargo of salt for *Wyburgh*, and after delivering the same there, should take on board a cargo of deals; in consideration of

(*t*) I have examined the record, and find it to be so. The issue is of *Trinity Term*, 32 & 33 *Geo.* 2 *Roll* 379. The declaration is for the freight of goods carried in the plaintiff's ship by sea, without mentioning from or to what place.

(*u*) *Cook v. Jennings*, 7 Term Rep. K. B. 381. The case came before the Court on a demurrer to the plea, which alleged that no part of the deals were delivered at *Liverpool* according to the charter-party.

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chants in Lisbon, and after the embargo was taken off, freight was claimed by the master, the court said, in this case the cargo is claimed for persons not subject to the embargo. The ship was brought in as a Swedish ship and on that account only; the detention has been occasioned without any co-operation on the part of the cargo. The cargo has been brought out of its course, and has been detained on account of the ship, and is finally compelled to find another vehicle, to convey it to its market. Under such circumstances it is not liable to the demand of freight. The Werldsborgaren, 4 Rob. Adm. Rep. 17.

which the defendant agreed to pay to the plaintiff, "in full for the freight and hire of the ship [309] "for the said voyage, at and after the rate of "7*l.* per standard hundred for deals *delivered at Liver-* "*pool &c.* the freight to be paid one-fourth in cash at "her arrival, and the remainder by an acceptance on "*London* at four months date." The plaintiff in support of his action alleged, that the ship, after carrying the cargo of salt to *Wyburgh*, took on board there a cargo of deals, &c. and proceeded on her voyage for and towards *Liverpool*, *&c.*; and whilst the ship was so proceeding, and after she had performed a great part of her voyage, but before her arrival at *Liverpool*, the ship was by the force and violence of the winds and waves, wrecked and cast upon the shore, and thereby became incapable of proceeding any further on the voyage, by reason whereof it became necessary to put the cargo of deals on shore for the preservation thereof; which said cargo "so unladed the defendant accepted and received into "his hands and possession, and sold and disposed of "the same to his own use, whereby he became liable to "pay to the plaintiff a proportionable part of the said "freight and hire of the ship for the carriage of the said "cargo of deals, for such part of the voyage from *Wy-* "*burgh* to *Liverpool* as the ship performed;" which proportionable part amounted to the sum of 300*l.*; and for the recovery of that sum the action was brought.

These facts were admitted to be true, and it was admitted that no part of the cargo was conveyed to *Liverpool*. The plaintiff did not pretend that he [310] had offered to convey the deals thither, nor did the defendant assert that he had required him to do so. The Court of King's Bench decided that the plaintiff

could recover nothing in the present action. *Lord Kenyon* said, "we are called upon to decide in this action "according to the rules of law, on a contract between "these parties, which was made in the most solemn "manner by a deed under seal; though indeed I do "not know that it would have made any difference, if "the question had arisen on a precise formal contract "not under seal. By the terms of this agreement the "defendant engaged to pay so much on delivery of the "goods at *Liverpool*, one-fourth in cash on her arrival, "and the remainder by an acceptance at four months: "but the goods never arrived; then at what time were "those bills to be dated? We do not sit here to make, "but to enforce contracts: and the question put to us "is, whether the freight is to be paid under this con-"tract though the ship never arrived, but was lost be-"fore her arrival at *Liverpool?* upon which I cannot "bring my mind to doubt. The case of *Luke v. Lyde* "is very distinguishable from the present, that being "the case of a general assumpsit for the freight of "goods; in which *Lord Mansfield* states the marine law "on this subject. But what has the case of an implied "contract to do with an express contract? *Lord Coke* "says, *expressum facit cessare tacitum.* Here the par-
"ties are bound by a precise agreement. Then
[311] "it is suggested, that we ought not to give ef-
"fect to this contract, because it is unreasona-"ble: but we are to decide according to the contract "of the parties; and the law says, that if A covenant "to enfeoff B, A is not released from his covenant, "though B will not accept livery of the seizen, unless the "act be frustrated by the act of the covenantee. It is "not necessary now to determine whether or not the

" the plaintiff might not have brought an action of assump-
" sit; it will be time enough to decide that case, when-
" ever the question arises. But here the question is,
" whether or not he can enforce payment of the money
" under this contract, not having carried the goods to
" *Liverpool*, and the defendant having only undertaken
" to pay on their delivery at *Liverpool;* in answer to
" this action the defendant has a right to say, *non hæc*
" *in fœdera veni.*"

The other Judges concurred in the same opinion; *Mr. Justice Grose* cited the case of *Bright v. Cowper*, as a direct authority against the plaintiff.

Mr. Justice Lawrence said: "I agree with the plain-
" tiff's counsel, that whether the contract be by parol
" or under seal, the operation of the law on it is equally
" the same. When a ship is driven on shore, it is the
" duty of the master either to repair his ship, or to pro-
" cure another; and having performed the voyage, he
" is then entitled to his freight: but he is not entitled
" to the whole freight, unless he perform the
" whole voyage, except in cases where the [312]
" owner of the goods prevents him; *nor is he*
" *entitled pro ratâ unless under a new agreement.* Per-
" haps the subsequent receipt of these goods by the de-
" fendant might have been evidence of a new contract
" between the parties: but here the plaintiff has resort-
" ed to the original agreement, under which the defen-
" dant only engaged to pay in the event of the ship's ar-
" rival at *Liverpool.* That event has not happened, and
" therefore the plaintiff cannot recover in this form of
" action." I presume, the learned Judge, in thus speak-
ing of the duty of the master, must be understood to

have expressed himself with a view to the master's "claim of his whole freight.

17. The case of *Bright v. Cowper* (*x*), cited by *Mr. Justice Grose*, happened in the time of *James* the First, at a period when mercantile causes or contracts had very seldom occupied the attention of English Courts of Justice. The report of it is in the following words: "Action of covenant brought upon a covenant made by "the merchant with a master of a ship, *videlicet*, that if "he would bring his freight to such a port, then he "would pay him such a sum, and shews that part of the "goods were taken away by pirates, and that the residue "of the goods were brought to the place appointed, and "there unladed, and that the merchant hath [313] "not paid, and so the covenant broken; and "the question was, whether the merchant should "pay the money agreed for, since all the merchandizes "were not brought to the place appointed? and the "Court was of opinion, that he ought not to pay the "money, because the agreement was not by him per-"formed." Upon reading this report it is not quite clear what was the real question before the Court; but it seems that the plaintiff claimed his *whole* freight, to which it might very properly be decided that he was not entitled, as he had not performed the *whole* contract; if he claimed a part only of the freight, and was held by the Court not to be entitled to any thing, it may be, that by the particular terms of the contract, the payment of freight was made to depend upon the delivery of the entire cargo. *Molloy*, immediately after the citation of this case, adds the following observation: "But

(*x*) 1 Brownlow, 21. cited ante p. 293.

" by the Civil Law this is *vis major* or *casus fortuitus*, " there being no default in the master or his mariners, " and the same is a danger or peril of the sea, which if " not in naval agreements expressed, yet is naturally " implied: for most certain had those goods, which the " pirates carried away, in stress of weather, *navis levan-* " *dæ causa* been thrown overboard, the same would not " have made a disability as to the receipt of the sum " agreed on; for by both the common law and the law " marine, the act of God, or that of an enemy, shall no " ways work a wrong in actions private" (*y*). (1)

(*y*) *Molloy*, book 2. ch. 4. sect. 7.

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(1) The same doctrine was recognized in the following case. The plaintiffs as agents of the brig Jefferson, let her to the defendant for a voyage from the port of New-York to St. Lucia, and back again to New-York. The plaintiffs covenanted to take in the cargo and carry it to St. Lucia, and to bring back a return cargo and deliver it, &c.; and the defendant covenanted to load the vessel and to pay the plaintiffs for the charter of the brig $2750. It was also agreed in the charter-party that on the delivery of the outward cargo at St. Lucia, $1800 should be considered as earned and due, and should be paid by a draft at 60 days, and the remaining $950 should be paid on the return of the vessel to New-York, and the delivery of the cargo there. The brig sailed on the voyage and delivered her outward cargo at St. Lucia, and having on board her homeward cargo, after prosecuting about three-fourths of the distance of her return voyage, on the high seas, she was run foul by a vessel and so much injured that the crew left her, and the brig was taken possession of by other persons and brought into New-York, after a passage of 18 days, and on being libelled one half of the property was decreed to the libellants. An ac-

18. But as the right to freight does not com-
[314] mence until the ship has broken ground and begun the voyage, no partial payment can be claimed for goods laden on board, if even without the fault of the master the ship is prevented from actually setting forth on the voyage. And therefore in the case of a ship, which took on board a cargo in *Salt River*, in *Jamaica*, at a very great expense to the owners, (who by the usage of the *West-India* trade fetch the cargoes from

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tion was brought on the charter-party to recover the $950 for the homeward freight, the $1800 having been paid pursuant to the stipulation in the charter-party. The Court were of opinion that the plaintiffs could not recover in an action upon the charter-party. That as the contract was entire, the ship being chartered for a specific sum for the voyage, and payment was to be made only upon the delivery of the cargo at New-York, it was a condition precedent that the cargo should be there delivered before the right to recover freight would accrue. That not having been done within the intent of the parties in the present case, the plaintiff could not recover in the present form of action. At the same time the court thought that the plaintiffs, consistently with the case of Luke v. Lyde, 2 Burr. 882., would be entitled in another form of action to a freight in proportion to the value of the goods actually received, which, deducting the salvage in this case, would be one half of the cargo. Post & another v. Robertson. 1 John. New-York Rep. 24. But see the argument of Justice Livingston, who dissented in the same case from the majority of the Court on the point of a *pro rata* freight being due.

An action was brought on a charter-party, which was dated 6th of February, but in fact was not executed (and was so averred) until 15th of March, and it contained a covenant by

the shore at *their* expense,) and which actually cleared out for the voyage, but, while waiting for convoy, was cut out of the river by two *French* privateers, and being afterwards retaken, was carried into *Port Royal*, where the cargo was sold under an order of the Court of Admiralty, and the proceeds thereof with the deduction of salvage paid to the merchants: it was decided that nothing could be claimed of the merchants, although

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the owner that the ship should proceed from Deptford where she then lay, *on or before the 12th day of the said February*, on her outward bound voyage, and return, &c., and a covenant by the freighter *that in consideration of every thing above mentioned, &c.*, he would pay a certain freight for the voyage. The voyage was performed and freight earned; and the question was whether the plaintiff was entitled to recover upon the charter-party, it appearing that the vessel had not sailed *on or before the 12th of February*, according to the charter-party. The court were of opinion that this part of the charter-party, even admitting it to be a condition precedent, having been rendered impossible to be performed by the parties themselves, not having executed the deed until after the time appointed to do the act, the performance of it was dispensed with and formed no part of the contract. Lord Ellenborough inclined to believe that had it been possible to be performed, it would have been a condition precedent; but Mr. Justice Lawrence was of opinion that it was rather of the nature of a mutual independent covenant for the non-performance, of which an action might, under certain circumstances lay; that it resembled the case of Constable v. Cloberie, Palm. 397. cited Abbot, 188., in which case the substance of the covenant was, that the vessel should sail the voyage, and not merely that she should sail with the next fair wind. Hall v. Cazenove, 4 East. Rep. 477.

each of the Judges expressly recognized the rule of the marine law as to the partition of freight *pro ratâ itineris*: the Court holding, that in this case there had been no commencement of the voyage, and therefore no freight could be due; and that, as the freight was by the contract the only remuneration of all the services performed by the owners, they were not entitled to any recompence for the expense of taking the goods on board (*z*). (1)

19. It oftens happens that a ship is hired by [315] a charter-party to sail from one port to another, and from thence back to the first, as for instance from *London* to *Leghorn*, and back from thence to *London*, at a certain sum to be paid for every month or other period of the duration of the employment. Upon such a contract, if the whole is one entire voyage, and the ship sail in safety to *Leghorn*, and there deliver the goods to the merchant, and take others on board to be brought to *London*, but happen to be lost in her return thither, nothing is due for freight, although the merchant has had the benefit of the voyage to *Leghorn*:

(*z*) *Curling v. Long*, 1 Bos. & Pull. 634.

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(1) But, where the charter-party is for the voyage round, at a certain freight for the outward voyage, and a different freight for the homeward voyage; yet the contract is so far considerd entire, that a policy on the freight on the homeward voyage "at and from the port of loading" is considered to attach, while the ship is delivering her outward cargo at the port, and before any of the homeward cargo is taken in. Horncastle v. Suart, 7 East. Rep. 400. S. P. Thompson v. Taylor, 6 T. Rep. 478.

but if the outward and homeward voyage are distinct, freight will be due for the proportion of the time employed in the outward voyage (*a*).

Upon this point *Malyne* mentions a remarkable case of five ships, in which he himself was interested as one of the merchant freighters. The whole five were freighted out from this country for *Leghorn* and *Civita Vecchia*, and back from those places. They all performed their outward voyage, but before any part of the homeward cargo was shipped, they all set sail, and came away, through fear of being taken by the gallies of *Don Andrea Doria*, who intended to surprise them, the *Grand Armada* being then preparing in *Spain*. Two of the ships had waited for their lading the whole time stipulated by their charter-parties, and the mas- [316] ters had made their protests against the factors, who should have laded them. These two, says the author, were by the law of the Admiralty adjudged to have deserved their whole freight. Two others, not having waited the stipulated time, could not be found to have deserved any freight at all, although they were laden outward. The fifth ship also had not waited the stipulated time, but her charter-party contained a proviso, that if she should be taken or cast away on her return out of the *Streights*, the freight outwards, which was accounted half, should be paid: and that half and no more was adjudged to the master (*b*).

It should seem that this proviso, in the case of the fifth ship, occasioned the outward and homeward

(*a*). This proposition is laid down by *Molloy*, *book* 2. *ch.* 4. *sect.* 9. and he cites in support of it the before mentioned case of *Bright v. Cowper* with a reference to *Brownlow*, in whose report the point does not appear. Ante 297. sect. 12.

(*b*) *Malyne*. p. 98.

voyages to be considered as distinct voyages, for the event mentioned in the proviso had not happened. And a similar construction was given to a very different charter-party in the following case (*c*). *Mackrell*, the owner of a ship called the *Richard*, lying in the river *Thames*, let his ship to freight by a charter-party dated 9th of *March* 1774, to *Simond & another* "by the month,
"for such time as she should be employed in
[317] "performing a voyage from *London* to *Plym-*
"*outh*, and the island of *Grenada*, and from
"thence back to *London*," and whereby the plaintiff covenanted, "that the ship should, pursuant to the or-
"ders and directions of the freighters, their factors or
"assigns, prosecute and perform the voyage above-
"mentioned, (the dangers and perils of the sea, and
"the restraint of princes and rulers excepted,) and
"should in such *outward and homeward voyage* load
"and unload all lawful goods: and that his ship's company and boats should aid and assist in unloading and reloading the said ship's cargoes as customary at the island of *Grenada*, and that he would pay all port-charges and pilotage. In consideration whereof the defendants covenanted that they "would load and un-
"load the ship, and give the master proper orders in
"respect thereof: and that the ship should be discharg-
"ed out of her said monthly employ on the delivery
"of her homeward cargo in *London*, and also should
"and would well and truly pay or cause to be paid to
"the said owner his executors, administrators, or as-

(*c*) *Mackrell v. Simond & Hankey*, in K. B. Trin. T. 16 *Geo.* 3. It was an action of covenant on the charter-party, in the first count of which the plaintiff claimed freight for the period of the voyage to *Grenada*; in the second up to the day of the loss of the ship. The defendants demurred to both counts. Judgment was given for the plaintiff on the first count, and for the defendants on the second.

" signs, in full for the freight and hire of the said ship " at the rate of 110*l.* sterling *per* calendar month, for " all such time as the said ship should be taken up in " performing the voyage aforesaid, to commence and be " accounted from the day of the date of the said char- " ter-party, and to end and determine on the day of the " discharge of the homeward cargo at *London*, and to " be paid one-third part thereof on her report inwards " at the custom-house, *London*, and the remain- " ing two-third parts thereof in two calendar [318] " months then next following."

In pursuance of this charter-party the ship took in goods belonging to the merchants *Simond & Hankey* at *London*, sailed with them to *Plymouth*, and there took in other goods belonging to them, and from thence proceeded to *Grenada*, and there landed the cargo; and received another cargo from the merchants' factor there, with which she set sail for *London;* but on the way was lost by tempest. The voyage to *Grenada* occupied *three* months; and *five* months elapsed in the whole before the loss of the ship: after the misfortune the owner brought an action against the merchants, claiming of them the payment of freight either for *three*, or for *five* months. The merchants insisted that nothing was due. The Court decided that freight was payable for *three* months, the period of the outward voyage. And *Lord Mansfield* delivered his judgment to the following effect: " This question depends upon the construction of the " charter-party. If the parties have expressed their " meaning defectively, the Court must be guided by " the nature of the thing. The charter-party puts no " case but that of a prosperous voyage out and home; " it provides for freight on the supposition that the ship

" will arrive safe and report her cargo; no provision is " made for any other case. If the ship be cast away on " the coast of *England*, and never arrive at the port of " *London*, yet if the goods are saved, freight [319] " shall be paid, because the merchant receives " advantage from the voyage. This is not ex- " pressed by the charter-party, but arises out of the " equity of the case. Freight is the mother of wages, " the safety of the ship the mother of freight: that is " the general rule of the maritime law. If there be one " entire voyage out and in, and the ship be cast away on " the homeward voyage, no freight is due, no wages " are due, because the whole profit is lost; and by ex- " press agreement the parties may make the outward " and homeward voyage one. Nothing is more com- " mon than two voyages: wherever there are two voy- " ages, and one is performed, and the ship is lost in the " homeward voyage, freight is due for the first. Here " the outward and homeward voyage are so called in " the charter-party. The cargo is loaded outwards, " and the owner covenants to pay port-charges on the " outward voyage. The whole of that voyage was " completed: port duties are incurred and paid. Noth- " ing however is due on the homeward voyage, though " the ship might be out a month."

In the following case (*d*) the words of the charter-party being different, a different construction prevailed.

(*d*) *Byrne & others v. Pattinson*, in K. B. Trin. T. 37 *Geo.* 3. The question arose on a sett-off pleaded by the defendant, the master of the ship to an action brought against him on another account by the merchant. The plea did not refer to the charter-party, but was for the freight and hire of the ship from *Liverpool* to *Madeira*, and from thence to *Barbadoes*, and for the disbursements and port charges of the ship at *Madeira*, and on the voyage; and for work and labour generally, and money paid; so that the decision did not turn upon the form of the proceedings in the cause. The question came before the Court by a special case reserved from the assizes.

One *Pattinson*, master and part-owner of the ship *William and Mary*, lying at *Liverpool*, by a [320] charter-party, dated 28th *July* 1794, let the ship to freight to *Byrne & others*, for a voyage intended to be made from *Liverpool* to the island of *Madeira*, and from thence to the island of *Barbadoes*, and from thence back to *Liverpool*, *Greenock*, or *Bristol*, but with liberty for the freighters to order the said vessel from *Barbadoes* to any one other island in the *West Indies* (*Jamaica* excepted) they paying all pilotage and port-charges incurred thereby. And the said freighters accordingly by the said charter-party took and hired the same in manner following (that is to say) that the master should immediately receive and take a cargo on board the said vessel from the freighters, and the said vessel so loaded should immediately proceed direct to *Madeira*, and deliver such goods as should be ordered by the said freighters, and also should receive and take on board the said vessel at *Madeira* such other goods as the said freighters might think proper to ship, and that being done the master should proceed with the said vessel to *Barbadoes*, and there make delivery of her cargo, and receive and take on board a cargo from the freighters, and being loaden therewith, should with the first opportunity proceed direct to the port of *Liverpool*, *Greenock* or *Bristol*, and there deliver the same cargo, and so *end the said intended voyage*. In consid- [321] eration of which the said freighters thereby promised and agreed, amongst other things, to pay to the *defendant* in full for the freight and hire of the ship for the said voyage the sum of 136*l*. 10*s*. *per* calendar month for six months certain, to commence in eight days after she was ready to receive the cargo at *Liver-*

pool, and to continue until she was discharged at *Liverpool*, *Greenock*, or *Bristol*, together with two thirds the amount of all pilotage and port-charges, that might accrue, and be paid during the course of the said voyage, with customary primage ; payment thereof to be made in manner following, *viz.* 136*l.* 10*s.* to be advanced before sailing from *Liverpool* by a good bill at three months date, and what cash might be required for the said vessel's disbursements and port-charges at *Madeira*, and *Barbadoes*, to be paid in part of the said freight, and the remainder of the said freight should become due and be paid on the final discharge of the said vessel at *Liverpool*, *Greenock*, or *Bristol*, by good bills on *London* at three months date. The period of computation commenced on the 7th of *August* 1794 ; on the 19th of that month the ship sailed from *Liverpool* for *Madeira*, freighted with goods, and arrived there on the 13th of *September*, and discharged at that place, by the 4th of *October*, as many of the goods as were to be delivered there, and took on board on account of the merchants ninety pipes of wine, and sailed from thence on the 9th of *October* for *Barbadoes*, but on the 10th of
[322] *November* was captured on the way thither.

The merchants had paid 135*l.* part of the freight for the first month, and also the port-charges and disbursements for the ship at *Madeira*. *Pallinson* now claimed in the present suit further freight from the 7th of *September* to the day of the ship's capture, or to the day when she had completed the delivery at *Madeira*, or freight for the goods delivered there at the usual rate of coveyance, allowing the 135*l.* But the Court held that he had no claim whatever. On his part it was contended that there ought to be an apportionment

in this case; and the passage before cited from *Malyne*, relating to a ship lost at *Dover*, was quoted as an authority in his favour. But *Lord Kenyon*, Chief Justice, said, "In that case the goods came to the merchants' "hands, and the owner of the ship might have provided "another ship to carry them to *London*. In this case, "by the terms of the contract, the freight is to *be-* "*come due* at *Liverpool*, and therefore it cannot be "claimed before."

These two cases may serve as a guide for the construction of other charter-parties on the same subject, or for the framing of a charter-party in such a manner as to express the real meaning of the contracting parties without ambiguity (1).

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(1) A ship was chartered from New-York to Martinique, and back to New-York, for the entire sum of $4,500, which was to be paid in 60 days after the delivery of the return cargo at New-York. The ship delivered the outward cargo at Martinique, and on her return with the homeward cargo was captured and carried into Antigua, where the cargo was libelled in the Admiralty Court and detained for further proof, subject to the lien of freight. The ship returned to New-York without the cargo. The goods were apprized by the Admiralty Court, and afterwards on further proof, ordered to be restored to the claimants. It was held that the contract was entire, and no freight could be recovered in an action on the charter-party because the ship did not deliver the return cargo at New-York, which was required by the express agreement of the parties. A *pro rata* freight (for which the action, which was assumpsit, was brought) was denied upon another ground. Barker v. Cheviot, 2 John. Rep. 352.

A ship was chartered from New-York to St. Domingo, and back to New-York, for an entire sum payable in 60 days after

20. By a charter-party, made for a voyage from *London* or *Portsmouth* to *Monte Video*, and back to some port of discharge in *Great Britain*, with a provision that the master should touch at the coast of *Africa* [323] for a certain purpose, if required; the freighter covenanted to pay 670*l.* *per* month, for every

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the return of the ship to New-York. On arriving at St. Domingo the ship was turned away by a British cruiser on account of the blockade of the port, and returned to New-York with her original cargo. It was held that no freight was due; not the whole, because the voyage had not been performed; not a *pro rata* freight, because there had been no acceptance of the goods at an *intermediate port*. Scott v. Libby, 2 John. Rep. 336.

A ship was let to freight under a charter-party on a voyage from Shields to Lisbon, *the freight to be paid on a right delivery of the cargo*. The ship sailed from Shields and joined convoy at Portsmouth, and after being detained a month off Lymington, her sailing orders were recalled by the convoy in consequence of the occupation of Portugal by the French, and the charterers having refused to receive the cargo at Portsmouth to which the ship returned, it was unloaded by the owner of the ship after notice to them, and sold by consent of parties without prejudice; the court were of opinion that no freight *pro rata* was due. Lord Ellenborough said the case of Luke v. Lyde has been often pressed beyond its fair bearing; but the true sense of it has been explained by my brother Lawrence in Cook v. Jennings, 7 T. Rep. 381., and my brother Le Blanc, in Mulloy v. Backer, 5 East. Rep. 316. Liddard v. Lopes, 10 East. Rep. 526.

But where by a charter- party a ship was let to freight for 12 months certain, and from thence for a longer period, if any, that the charterer should think fit to keep and retain the same,

calendar month the ship should be employed by him the freighter during her said intended voyage to *Monte Video* and back to her port of discharge, and so in proportion for any less time; in full for the hire of the ship during her intended service; such freight to commence from the day the ship should be ready to receive goods on board at *Portsmouth*, and end when she should have finally discharged the whole of her said cargo; and also to pay two thirds of all pilotage and port charges during the whole of the voyage, and also two thirds of all expenses of stowing the said ship's cargo at *Monte*

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and the freight was to be paid 24s. per month per ton, being 1119*l.* 12s. per month commencing from the 24. September, 1806, and *ending when the ship should be returned to the river Thames, and there by the freighters declared to be discharged*, but the ship was not to be discharged abroad, though abroad at the end of 12 months, but to be discharged at London; and the freight was to be paid, 2 months freight at the execution of the charter-party, 2 months more at the end of six months from 24. September, 1806, 2 months more at ten months, 2 months more at 14 months, should the ship be so long employed, and in like manner 2 months more at the end of every two calendar months *until the ship should be discharged, and immediately upon such discharge* the balance to be paid by the freighters. It was held that the freight being reserved at so much per month was earned at the end of each month, although the times stipulated for payment were from 4 months to 4 months, and the ship was lost before the end of 14 months; and the postponement of the payment did not create a contingency whether it should be paid at all. Havelock v. Geddes, 10 East Rep. 555.

Video; *such freight, pilotage, and port charges to be paid on the arrival and discharge of the ship at her destined port in Great Britain.* Upon this contract an action was brought against the freighter, and it was alleged, on the part of the owner, that the ship took in such goods at *Portsmouth* as the freighter thought fit to lade, and then proceeded on the voyage, and touched at the coast of *Africa* as required, and in the prosecution of the outward voyage was before her arrival at *Monte Vi-*

In the same charter-party there was a clause that an allowance of extra men should be paid by the charterer, and after part payment, "the residue of such allowance was not to be "paid until the ship's discharge or return from her first intend-"ed voyage, and in like manner for any other foreign voyage "or voyages;" it was held that the ship having been lost by fire before her return, this loss was within the true intent and meaning of the charter-party a discharge of the ship from the further prosecution of the adventure and employment in which she was engaged; and upon that event the residue of the extra allowance became payable, as if the discharge had taken place by the act of the charterers themselves; and that they must be understood to have discharged the ship when they could by no possibility any longer employ her. id. ibid.

Where a ship was let to freight on a voyage to the East Indies and back, and the owner was to receive in lieu of freight for the voyage one half of the nett profits of the cargo, deducting all charges except insurance, and premium on dollars, of which the outward cargo consisted; and during the voyage part of the cargo was lost by the perils of the seas; it was held that the loss was to be deducted out of the profits, and so sustained equally by the owner and freighter. Putnam v. Wood, 3 Mass. Rep. 481. S. P. 4 Mass. 672.

deo, without the fault of the owner, master, or crew, by persons unknown wrongfully seized and sent to *London*, and there detained for a considerable time, but afterwards liberated and restored to him, that he then made the necessary repairs, and having properly fitted, victualled, and manned the ship, gave notice thereof to the freighter, and offered to prosecute and complete the voyage, and required from him the necessary directions for that purpose, but that the [324] freighter refused to give any directions, or to permit the ship to pursue the voyage, and wholly renounced the charter-party, and discharged the owner from further prosecuting the voyage. It was further alleged that the ship had been employed in the voyage twelve months, and that the freight thereof amounted to 8040*l.*; that she would have been employed for twelve months more, if the freighter would have permitted, and the freight thereof would have amounted to another sum of 8040*l.* and that two third parts of the pilotage and port charges during the voyage amounted to 50*l.*: and the complaint was that the freighter, who had been requested to pay these sums, had refused to do so. So that by the form of the action the owner claimed to recover the freight, &c. as due, and not to recover damages against the freighter for refusing to allow him to prosecute the voyage (*e*). And on behalf of the owner it was contended, that as he had done all in his power toward the completion of the voyage, and the further prosecution

(*e*) It is not clear that the charterparty contained any covenant, on the part of the freighter, that would have furnished a ground for such an action for damages.*

*See ante The Hoffnung, 6 Rob. Adm. Rep. 231. cited ante, 272. and the Hiram, 3 Rob. Adm. Rep. 180. cited ante, 296. note.

and completion of it were prevented by the freighter, he had acquired a right to the sum demanded as freight, &c. as fully as if the voyage had been performed, and the ship had arrived and been discharged at her destined port. But the Court, adverting to the par-
[325] ticular terms of the contract, whereby the freight, &c. were made payable on the arrival and discharge of the ship at her destined port in *Great Britain*, and considering that the efforts of the owner could not possibly insure this event, which might be defeated by the act of God, and various accidents, to which marine adventures are subject, held this not to be one of those cases, in which an offer to perform an act, if refused by the party to be charged by the performance, is equivalent to performance itself, and consequently that the owner was not entitled to recover the freight, &c. which he claimed in this action (*f*). (1)

(*f*) *Smith v. Wilson*, 8. East. 437 It was an action of covenant, the facts stated in the text were contained in the Plaintiff's declaration. The Defendant pleaded some special pleas to which the Plaintiff demurred. Upon the argument the Court disregarded the pleas, and gave judgment against the Plaintiff upon the declaration.

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(1) Questions have arisen in cases where the ship and freight have been separately insured, and abandoned to the respective underwriters, as to the party to whom the accruing freight is to be paid, whether to the underwriters on the ship or on the freight. Much discussion was had on the subject in the cases of Thompson v. Rowcroft, 4 East. Rep. 34., and Leatham v. Terry, 3 Bos. & Pull. 485., and in the case of M'Carthy & others v. Abel, 5 East. Rep. 388. it seems to be decided that the underwriters of the ship are entitled to it, as an incident to the property of the ship. The same point is strongly intimated by Lord Ellenborough and Mr. Justice Lawrence in Sharp v.

Gladstone, 7 East. Rep. 24. They seemed however to think that a distinction might arise between the case of a *chartered* ship and a *seeking* ship.

In Leavenworth v. Delafield, 1 Cain. Rep. 573. the Court decided that upon an abandonment to the respective underwriters on ship and on freight, in case of capture, those on the freight were entitled to the proportion of freight earned before capture, and those on the ship to the freight earned afterwards; and said that it had been so decided by them in United Insurance Company v. Lenox, which has since been reported in 1 John. Cas. 377. and was affirmed in the court of appeals in 1801. In neither of these cases does it appear whether the ship was chartered for a specific sum or as a general ship. In Davy v. Hallet, 3 Cain. Rep. 21. the Court held that where ship and freight are insured separately, an abandonment of the ship did not carry with it an abandonment of the freight, but that they were separate interests. So in Mumford v. Hallet, 1 John. Rep. 438., the Court held that where a cargo and its profits were separately insured, that an abandonment of the cargo did not prevent an abandonment from being made on the policy on profits. So in Livingston v. The Columbian Insurance Company, 3 John. Rep. 49., the Court held that freight is a distinct subject of insurance, and that a previous abandonment of the ship would not prevent the insured from recovering the freight insured by another person. But Kent, C. J. in delivering the opinion of the Court said, whether the abandonment of the ship deprives the insurer on freight of his salvage, or the hope of indemnity I need not say, *although the better opinion is that it does.* In this last case the ship was chartered at the entire freight of $1800, half payable at Rio de la Plata, and half at Hamburg or other port of discharge. Whether this would make any difference, and whether the cases in 1 Cain. Rep. 573. and 1 John. Cas. 377. are otherwise distinguishable from this,

or whether the doctrine in them is meant to be doubted, is for the reader's consideration.

On sale of a ship chartered for a particular voyage, if the ship be sold in the course of the voyage, this does not transfer the freight, and the vendee has no legal right to receive the freight and demurrer due from the freighter upon the charter-party. Splidt v. Bowles, 10 East. Rep. 279.

CHAPTER THE EIGHTH.

OF GENERAL OR GROSS AVERAGE.

1. HAVING thus treated of the respective duties of the owner and the merchant, I now proceed to the consideration of a subject, which is equally a duty of the one and the other: namely the general contribution, that is to be made by all parties, toward a loss sustained by some for the benefit of all. This contribution is sometimes called by the name of *general* [326] average, to distinguish it from *special* or *particular* average, a very incorrect expression, used to denote every kind of partial loss or damage happening either to the ship or cargo from any cause whatever; and sometimes by the name of *gross* average, to distinguish it from *customary* average mentioned in the bill of lading, which latter species is sometimes called also *petty* average. The principle of this general contribution is known to be derived from the ancient laws of *Rhodes*, being adopted into the Digest of *Justinian* with an express recognition of its true origin. The wisdom and equity of the rule will do honor to the memory of the state, from whose code it has been derived, as long as maritime commerce shall endure. The principle of the rule has been adopted by all commercial nations, but there is no principle of maritime law, that has been followed by more variations in practice. The modern ordinances of the several continental states of *Europe* differ from each other in many particulars relating to this general con-

tribution, and the *French* Ordinance establishes a different mode of contribution in different cases. An enumeration of these varieties would furnish little entertainment or instruction to an *English* reader: discordant rules rather serve to perplex the choice, than to guide the judgment. If any one is desirous of knowing all, that doctors have written, and states ordained, on these particulars, I must refer him to the very [327] elaborate and learned treatise of *Emerigon* on insurance(*a*), a work, in which no subject is discussed without being exhausted. The determinations of *English* Courts of Justice furnish less of authority on this subject than on any other branch of maritime law; there being only three reported cases of questions between the parties liable to contribution in the first instance, and very few of questions between the party so liable and the insurer, from whom indemnity has been sought. The work of *Magens* contains a variety of cases of adjustment of average, by consuls and courts abroad and by merchants at home, detailed with all the tedious formularies of the notarial office, and the minutiæ of the counting-house, but accompanied by some very judicious remarks. The most useful information upon this subject is to be found in *Mr. Park's* system of maritime insurances, but as the nature of the present work requires that it should also be treated of here, I shall examine, *first*, the cases in which general contribution is to be made; *secondly*, the articles that are to contribute; and *lastly*, the mode of contribution; confining myself as closely as possible to the authorities and practice of our own nation, or to those ancient laws and or-

(*a*) Chap. 12. sections 39 to 42. *See* also on the subject of this chapter *Weskett* on Insurance titles, *Contribution, Cutting, General Average,* and *Jettison,* in which are many citations from the foreign ordinances.

dinances, which are generally considered as guides by *English* lawyers on subjects of maritime law.

2. The rule of the *Rhodian* law is this: "If "goods are thrown overboard in order to light- [328] "en a ship, the loss, incurred for the sake of "all, shall be made good by the contribution of all" (*b*). The goods must be *thrown* overboard: the mind and agency of man must be employed: if the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship by lightning or tempest, the merchant alone must bear the loss. They must be thrown overboard *to lighten the ship;* if they are cast overboard by the wanton caprice of the crew or the passengers, *they*, or the master and owners for them, must make good the loss. The goods must be thrown overboard *for the sake of all;* not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped, or received the goods; but, because at a moment of distress and danger their weight, or their presence, prevents the extraordinary exertions required for the general safety. When the ship is in danger of perishing from the violent agitation of the wind, or from the quantity of water, that may have forced a way into it, or is laboring on a rock, or a shallow, upon which it may have been driven by a tempest; or when a pirate or an enemy, pursues, gains ground, and is ready to overtake; no measure that may facili-

(*b*) *Dig.* 14. 2. 1. Lege Rhodia cavetur, ut, si levandæ navis gratia jactus mercium factus sit, omnium contributione sarciatur, quod pro omnibus datum est.

tate the motion and passage of the ship, can be
[329] really injurious to any one, who is interested in
the welfare of any part of the adventure, and every such measure *may* be beneficial to almost all. In such emergencies therefore, when the mind of the brave is appalled, it is lawful to have recourse to every mode of preservation, and to cast out the goods in order to lighten the ship, for the sake of all (*c*). But if the ship and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, and therefore all must contribute to the loss.

3. Many of the foreign ordinances (*d*) have prescribed various forms to be adopted with respect to jettison; some of them have even named the persons to be consulted before it takes place, and have set down the phrases of consultation, and specified the sorts of goods that shall be first thrown; and some authors have amused themselves by dividing the act itself into the several species of regular and irregular, formal and informal (*e*). But the regulations prescribed by persons at ease in the
closet or the senate-house will seldom be followed
[330] at the moment when life, or liberty, is in jeopardy;
at such a moment every one present will exclaim with the friend of *Juvenal*, *Fundite, quæ mea sunt--etiam pulcherrima;* and provided the jettison have been the effect of danger and the cause of safety, all writers agree that contribution ought to be made, although the forms

(*c*) *Mouse's* case, 12 Co. 63. mentioned also in *Bird v. Astcock*, 2 Bulst. 280.

(*d*) Laws of *Oleron*, art. 8. & 9. Ordin. of *Wisbuy*, art. 20, 21, and 38. *French Ordinance*. liv. 3. tit. 8. *Du Jet*, art. 1, 2, 3, & 4. and *Valin* thereon.

(*e*) See *Emerigon*, tom i. p. 605.

have not been complied with. Previous deliberation, if there be time to deliberate, and a due choice of the heaviest and most cumbersome articles, may be proofs of the necessity and propriety of the act; but they are not the *only*, and therefore ought not be deemed the *essential* proofs (*f*). Indeed in this case, as in many others, too close a compliance with forms at a period of supposed danger has very justly excited a suspicion of fraud (*g*). In all cases however, and in all countries, it is justly required of the master that he draw up an account of the jettison, and verify the same by the oath of himself and of some of his crew, as soon as possible after his arrival at any port, that there may be no opportunity to purloin goods from the ship, and then pretend they were cast over in the danger.

4. From the rule thus established by the *Rhodians* various corollaries have been deduced. [331] Thus, if in the act of jettison, or in order to accomplish it, or in consequence of it, other goods in the ship are broken, damaged, or destroyed, the value of these also must be included in the general contribution (1). So, if to avoid an impending danger, or to re-

(*f*) So decided in *Birkley & others v. Presgrave*, 1 East. Rep. K. B. 220, as to other cases of *general average*.

(*g*) *Emerigon*, tom. i. p. 605. cites an observation of *Targa*, who says, that during *sixty* years, in which he had been a magistrate at *Genoa*, conversant with this subject, he had known only *five* instances of regular jettison, all of which were suspected of fraud, because the forms had been too well observed.

(1) All damage immediately arising from jettison or other act of necessity is to be contributed for, though it happen to perishable articles which remain in specie. Therefore if in cutting away a mast, it be splintered, so that corn which is part

pair the damage occasioned by a storm (*h*), the ship be compelled to take refuge in a port, to which it was not destined, and into which it cannot enter without taking out a part of the cargo, and the part taken out to lighten the ship on this occasion happen to be lost in the barges employed to convey it to the shore, this loss also, being occasioned by the removal of the goods for the general benefit, must be repaired by general contribution; but if, after the removal of goods for such a purpose, the ship with the remaining cargo should unfortunately perish, and the goods in the barges be saved, the proprietors of the latter shall not contribute to the loss of the others, because the safety thereof is not owing to that loss. So if part of the cargo be voluntarily, and without fraud or cowardice delivered up to a pirate by way of composition or ransom, to induce him to spare the vessel, and the residue of the goods, (an event highly improbable,) or if a sum of money be agreed to be paid to a pirate or enemy by way of ransom, all [332] writers agree that the value of the ransomed must contribute to this loss also; but if the enemy or pirate, having overpowered the ship, select for himself such parts of the cargo as best suit his purposes, and plunder the ship of them, in this case there

(*h*) In the *Dig.* 14, 2. 4. and the *Guidon*, ch. 5. art. 28. the rule is laid down in general terms, but most writers confine it to the cases mentioned in the text. See *Beawes*, 165. 2 *Valin*, 167. Yet see *Wellwood*, tit. 20.

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of the cargo, sustain damage, that damage is to be included in the general average. So if in removing and throwing over any part of the cargo, another part is injured. Maggrath, &c. v. Church, 1 Caine's New-York Rep. 196.

shall be no contribution, because the value of these goods was not the price of safety to others (*i*). But ransom in the case of capture by an enemy, can hardly become the subject of general average in this country, for by an act passed in the twenty-second year of his present Majesty's reign (*k*), the ransom of any ship or merchandize on board the same, belonging to any subject of this country, and taken by "the subjects of any "state at war with his Majesty, or by any persons com- "mitting hostilities against his Majesty's subjects," is absolutely prohibited; and by a statute made at the commencement of the present war (*l*), such ransom is prohibited, "unless in the case of extreme necessity to be "allowed by the Court of Admiralty;" and all contracts for ransom contrary to these statutes are made void; and the person entering into such contract is subjected to a penalty of *five hundred* pounds.

5. And not only may the *loss* of goods become the subject of general contribution, but [333] also in some cases the *expense* incurred in relation to them (*m*). Thus, if it be necessary to unlade the goods in order to repair the damage done to a ship by tempest, so as to enable it to prosecute and complete the voyage, it seems that the expense of unlading, warehousing, and re-shipping the goods, should be sustained by general contribution, because all persons are

(*i*) *Dig.* 14. 2. 2. 3. *Hicks v. Palington*, Moore, 297. See 22 *Geo.* 3. *c.* 25. and *query* if it affects this. *Wellwood*, tit. 18.

(*k*) 22 *Geo.* 3. *c.* 25. This statute is not limited as to time, yet the 37th and two following clauses of the 33 *Geo.* 3. *c.* 66. contained the same prohibition, &c. of ransom, and the latter statute was made to continue only during the *last* war with *France*.

(*l*) 43 *Geo.* 3. *c.* 160. *sect.* 34, 35. 45 *Geo.* 3. *c.* 72. *sect.* 16, 17.

(*m*) See the COPENHAGEN, *Mening*, 1 Rob. A. R. 289. and *Da Costa v. Newnham*, 2 Ter. Rep. K. B. 407. also the GRATITUDINE, *Mazzola*, 3 Rob. A. R. 257, where this seems to have been admitted.

interested in the execution of the measures necessary to the completion of the voyage.*

6. The rule mentions *goods* only; but its principle extends also to the ship and its furniture: and all that I have hitherto said respecting the goods, is to be understood also of the provisions, the guns, the boat, or other tackle of the ship; a fortiori, it is also to be understood of goods belonging to the owner or master of the ship, as well as of those belonging to the merchant. *Emerigon* illustrates the case of the *boat*, by the relation of a stratagem practised by one of his own countrymen. The master of a French vessel, having been pursued for several hours by two frigates, and having also his flight intercepted by the appearance of two other vessels a-head, hoisted, as soon as it became dark, his boat into the sea, furnished with a mast and sail, and a lanthorn at the mast head, and then changed his [334] course, and sailed during the whole night without any light on board his own ship: in the morning no enemy was in sight. The value of the boat thus abandoned, was made good by general contribution (*n*).

7. If sails are blown away, or masts or cables broken by the violence of the wind, the owner alone must bear the loss (*o*). The broken tools of an artificer bring no charge upon his employer. And this rule has been held to apply to the case of a mainmast broken in a heavy gale, by carrying an unusual press of sail in order to escape from an enemy, to whom a ship had struck (*p*).

(*n*) *Emerigon*, tom. 1. page 622.
(*o*) *Dig.* 14. 2. 2. 1. and 14. 2. 6. *Wellwood*, tit. 17. *Roccus*, not. 60. Laws of *Oleron*, art. 9. Laws of *Wisbuy*, art. 12.
(*p*) *Covington v. Roberts*, 2. *Bos.* and *Pull*, N. R. 378.

*Post s. 7. 8.

But if the master, compelled by necessity, cut his cable (*q*) from the anchor, in order to use it as a hawser, or if he cut away and abandon his masts (*r*), sails, or cables, to lighten and preserve the ship, their value must be made good by contribution.

In like manner (*s*) the damage voluntarily done to a ship by cutting its deck or sides in order to facilitate a necessary jettison, or by running it on a rock, shallow, or strand, to avoid the danger of a storm, or of an enemy, and the expense of recovering the ship (*t*) from this latter situation; and also the pilot- [335] age, port duties, and other charges incurred by taking a ship into a port to avoid an impending peril, and the expense of extraordinary assistance (*u*) to preserve and secure a ship from the violence of a storm at its entrance into the port of destination, are to be sustained by a general contribution (1). But the ex-

(*q*) *Birkley & others v. Presgrave*, 1 East. 220.

(*r*) *Marsham v. Dutrey*, select cases of evidence, p. 58. *Dig.* 14. 2. 3. and 5. 1.

(*s*) *Dig.* 14. 2. 2. 1.

(*t*) Laws of *Wisbuy*, art. 55. *Molloy*, book 2. chap. 6. sect. 15. and *see* also *Beawes*, p. 165. and *Wellwood*, tit. 20.

(*u*) *Birkley & others v. Presgrave*, 1 East. 220.

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(1) In case a ship be *voluntarily* stranded to save the cargo, the loss of the ship becomes a general average. But where the ship is *involuntarily* wrecked and part of the cargo saved and part lost, no general average is due. Emerigon (tom. 1. p. 612.) states this rule, "the owner of the ship wrecked, and the owners of the merchandize lost in the shipwreck, have no right to contribution from those who have the good fortune to save their effects; because the loss that the one and the other has sustained, has not procured the common safety. The rule of the civil law is the same. Amissæ navis damnum, collationis con-

pense incurred in a port, in which the ship may have taken refuge during the voyage, by repairing the damage done to the ship by tempest alone, seems with more propriety to fall upon the owners, and is so held to do in the civil law (*x*), and by many foreign writers. And although the decision of the Court of King's Bench, in the case of *Da Costa v. Newnham* (*y*), has been considered as an authority for a contrary doctrine, yet, in my humble judgment, the facts upon which that decision was founded, do not warrant such a conclusion.

8. Upon another point, relating to the situation of a ship taking refuge in a port to repair the damage occasioned by tempest in order to prosecute and complete the voyage, a reasonable doubt may be entertained,

(*x*) *Dig.* 14. 2. 6. and *Emerigon*, tom. 1. p. 625.

(*y*) 2 Ter. Rep. K. B. p. 407. This was an action brought against the insurers of a ship by the owner who had offered to abandon to them and had a right to insist upon doing so, but had reluctantly consented to the repairs at their instance.

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sortio non sarcitur per eos, qui merces suas naufragio liberaverunt; nam hujus æquitatem tunc admitti placuit, cum jactus remedio, ceteris in communi periculo, salva navi, consultum est. Lib. 5. ff. de Leg. Rhod. It is as in the case of a fire; he who saves his own saves for himself alone. Cum depressa navis, aut dejecta esset, quod quisque ex ea secum servasset, sibi servare respondit, tanquam ex incendio. Lib. 5. ff. cod. So Cleirac, p. 51. n. 4. "after shipwreck there is no contribution to be made between the merchandizes recovered and fished up, and those lost; but, *save who can.* So Caserege's disc. 121. n. 17. Kuricke. 780. 788. Lubeck. cap. 3. n. 1. See also Weskett, 132. sect. 4. 255. sect. 4. and 2 Brown's Civ. and Adm. Law. 199. 200.

and our law books furnish no decision. Some writers maintain generally that the wages and [336] maintenance of the crew, during the delay thus necessarily incurred for the attainment of this object, are to be sustained by general contribution (*z*). But the principle, upon which general contribution is founded, appears to me to furnish a distinction proper to be submitted to the consideration of the reader.

If the damage to be repaired, be in itself an object of contribution, it seems reasonable that all expenses necessary, although collateral, to the reparation, should also be objects of contribution; the accessary should follow the nature of its principal. On the other hand, if the damage itself be not such as to be the object of contribution, by the same rule neither ought the collateral expenses incurred with regard to the repairs to become so. In answer to this it is urged, that as the repairs are necessary to the completion of the voyage, in the attainment whereof all are interested, all ought to contribute to the expense of this necessary delay. But it should be remembered, that it is the duty of the owners not only to provide a stout and sufficient ship at the commencement of the voyage, but also, as far as in them lies, to maintain the ship in a perfect condition during the whole course of the voyage, and almost every charter-party contains an express covenant to this effect. If the ship be not worth all the charges of repairs, as well direct as collateral, a consideration wholly [337] different may take place; in the case now under

(*z*) *Beawes*, 166. And see *Park*, chap. 7. and *Emerigon*, tom. 1. p. 624. This is the practice at *Pisa*, as appears by the case of *Newman v. Cazalet*, Park, p. 424. *in the note.*

examination, the ship is assumed by all parties to be worth the charge, at least the contrary supposition is not introduced into the argument: and why should the merchant be charged in any shape toward the performance of a duty incumbent on the owner? What is here offered, as to wages and maintenance, may perhaps apply also to port-charges and other duties of the like nature incurred on the same account, but the reader will consider the whole as unsupported by authority, and propounded only for the consideration of the learned. (1)

There is indeed a decision of the Court of King's Bench, upon the construction of a charter-party, which may properly be mentioned in this place. A ship, chartered for a voyage to the *East Indies* and back, sprung

(1) In the case of Walden v. Leroy, 2 Caine's New-York Rep. 263., the court decided that if a vessel be from sea-damage, as by springing a leak, &c. obliged to bear away to a port of necessity in order to refit, the wages and provisions from the moment of bearing away to the period of sailing on her voyage after refitting, constitute a subject of general average. From this decision Mr. Justice Livingston in a very able and learned argument dissented and adopted the doctrine laid down in this section by Abbott. In the case of Breed v. Ship Venus, (cited ante, 160. note.) Judge Davis said "the modern and approved doctrine on this subject appears to be, that when a ship is obliged to go into port to repair, it is considered for the benefit of the whole concern; that the expenses of what is actually applied to the ship are to be sustained by the owner, but that all other expenses, including unloading and reloading the cargo, anchorage and pilotage are, subjects of general average." And he cited Scomberg to the same purpose.

a leak at sea on her return home, in consequence of which it became necessary to put into the *Cape of Good Hope*, and there take out the cargo in order to repair the ship. The ship, being repaired and reladen, returned home in safety; and the owners claimed from the freighter a payment in the nature of general average toward the expense of the repairs, the maintenance of the crew, and other charges connected with the repairs. But the court considering the import of several clauses of the charter-party to be that the owners should keep the ship in repair during the whole voyage at their own expense, and being also of opinion [338] that the expressions used in another clause tended to show that the defendant was to be liable to general average in the case of jettison alone; held that upon the construction of this charter-party the plaintiff was not entitled to recover any thing for the expenses thus incurred at the Cape (*a*).

9. With respect also to the wages and maintenance of the crew during the detention of a ship by the orders of a sovereign power, contradictory opinions are to be found in the works of writers on this subject (*b*). Some authors have taken a distinction between the case of an embargo in the lading port, and the arrest and detention of a ship during the course of the voyage. The *French* Ordinance provides for the latter case, by declaring, that if the ship be hired by the *month*, the charges shall be reputed general average; but if hired for the *voyage*, the owners alone shall bear them (*c*). The reason of this regulation is not easily discernible (*d*), and it is

(*a*) *Jackson & another v. Charnock*, 8 Ter. Rep. K. B. 509.

(*b*) *Emerigon*, tom. 1. p. 631. *Weawes*, 165.

(*c*) Liv. 3. tit. 7. *Des Avaries*. art. 7.

(*d*) But see *Pothier*, Ch. Partie, num. 85. *Emerigon*, tom. 1. p. 539.

in express contradiction to the spirit of another article of the same Ordinance on the subject of freight (*e*). In the before-mentioned case of *Da Costa v. Newnham*, Mr. Justice *Buller*, speaking of this expense of wages and provisions during the detention of a ship by [339] embargo, says, "the Court has said that "these charges shall fall upon the owners only, "and the freight must bear them." And this case does not seem to fall within the principle of the *Rhodian* law, because here the delay does not proceed from the act of the master or persons belonging to the ship; nor is it for the general benefit (1).

(*e*) Liv. 3. tit. 3. *Du fret.* art. 16.

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(1) In an action brought on a policy of insurance on goods, it was decided that the charterer was not entitled to recover his extra expenses in consequence of a detention by embargo, though he had hired the vessel by the month; and that such expenses are not the subject of general contribution. Penny & another v. New-York Insurance Company, 3 Caine's New-York Rep. 155. The same decision was had in Jones v. Insurance Company of North America, 4 Dall. Rep. 246; and held also to apply to detention by quarantine. Kingston v. Girard, 4 Dall. Rep. 274. But in Sharp v. Gladstone, 7 East. Rep. 24. under page 36. Lord Ellenborough on the argument seemed to consider that the wages and provisions which were charged during the detention in that case, (which was under the Russian embargo,) were subjects of general average, but afterwards the court decided that they were charges upon the ship and freight.

But wages and provisions during a detention *after capture* form a general average. Capture is a disaster, which happens

10. For the additional expense of the wages and maintenance of the crew incurred while a ship has been waiting for convoy, general contribution has sometimes been claimed; and three decisions of the different Courts in *Holland* on this subject are related by *Bynkershoek* (*f*), which seem worthy of notice in this place. In the first case the master of a general ship, which was armed, and had letters of marque, and was bound to several *Italian* ports, during a war between the *Dutch* and *French*, gave public notice of his intention to receive goods, and to sail for those ports, without the company of other ships.

(*f*) *Bynkershoek, Quæstiones Juris Privati*, lib. 4. cap. 25.

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without the fault of the owner of the goods or ship, and by superior force, and expenses incurred in consequence of it are for the common benefit of all, and it is not easy to assign a reason therefore why they should be borne by one of the parties in misfortune rather than all. And so are the judgments of the most enlightened nations. Leavenworth v. Delafield, 1 Caine's New-York Rep. 573. See also Speyer v. The New-York Insurance Company, 3 John. Rep. 88. and Kingston v. Girard, 4 Dall. Rep. 274.

However where a vessel was captured and *afterwards released*, but a part of the cargo was condemned, by judgment in a court of Vice Admiralty, from which judgment on the cargo an appeal was made, and pending this the master being unable to procure the requisite security to prosecute, compromised with the captors and paid a sum as a ransom, it was decided that the sum so paid was not a general average, but must be borne by the cargo alone, it not having been incurred for the benefit of the ship, freight and cargo, but for the latter only. Vandenheuvel v. United Insurance Company, 1 John. New-York Rep. 406.

Having received a cargo, he set sail under convoy of a ship of war destined for *Portsmouth*, entered with her the harbour of that place, and there waited a whole year for another convoy, under which he sailed to *Cadiz;* and there waited a second year for a third convoy, under which he sailed to *Italy*, and delivered his cargo there. Under these circumstances the master sued the merchants for general average, and obtained a decree [340] in his favour, which was confirmed by one Court of appeal, reversed by a second, and at last finally affirmed by the Senate, of which the learned author was then a member ; against his opinion, and against the general principles of law on this subject, and against the particular engagement made by the master on this occasion. This judgment appears to have been disapproved of in *Holland;* for, in another case, which happened soon afterwards, where five *Dutch* vessels coming from *Surinam*, and learning on their voyage that a war had broken out between the *Dutch* and *French*, put into *Plymouth*, and there waited for convoy ; which case also went through all the same tribunals, the Senate decreed against the claim of contribution. A *third* case happened soon afterwards, in which the same four Courts successively decreed in favour of the claim (*g*). But of this the circumstances were very different from the two former, and such as seem to warrant the judgments pronounced in it. It was the case of a ship freighted from *Amsterdam* to *Cadiz*, with a stipulation to sail with convoy either to that place or as far as *Lisbon*. The

(*g*) For the sake of those who complain of delay in the administration of justice in this country, it may be proper to mention, that in the *last* of these three foreign cases a period of nearly *seven* years elapsed between the *first* and the *last* sentence ; in the *second* a period of nearly *ten* years, and in the *first*, of almost *sixteen* years.

ship accordingly sailed under convoy of a man of war, in company with several other vessels, and when she came near *Lisbon*, fell in with a fleet of privateers, by which some of the other vessels [341] were captured, and the ship in question put into *Lisbon* in obedience to a signal from the man of war, and there waited six months before she could safely proceed to *Cadiz*. In this case it is to be observed, that the master put into port to avoid an extraordinary and impending peril, and not merely as a matter of general caution to avoid the ordinary dangers always accompanying a state of warfare. And the expense thus incurred appears perfectly analogous to the cases of jettison, and to fall within the principle of the *Rhodian* law. For in this case, as the learned author observes, it is clear that there was a present and impending peril; and it is clear also, that the voyage was delayed, not by any accident, but by design, in order to avoid the peril.

11. The Ordinance of the *Hanse-Towns* also mentions as an object of general average the expense of healing mariners wounded in the defence of the ship against the attack of pirates (*h*): I have already mentioned the provisions made by the legislature of this country for persons of this description (*i*). On the expense of repairing the injury done to a ship during a combat, foreign writers differ in opinion (*k*). This seems to fall within the class of expenses incurred for the general safety: but I do not find any author- [342] ity in the law of *England* relating to it. In the *Guidon*, an injury done to the cargo by the shot of cannon, is said to be a charge upon the merchant only (*l*).

(*h*) Art. 35.
(*i*) Part. 2. ch. 4. sect. 12 & 13.
(*k*) 2 *Valin*, 168. *Pothier* traite des Avaries, *sect.* 2. *num.* 144. & 154. *Emerigon*, tom. 1. p. 628.
(*l*) Ch. 5. art. 4.

12. By the law of most of the continental nations of *Europe* the injury done by one ship to another, or to its cargo, without fault in the persons belonging to either ship, is to be equally borne by the owners of the two vessels (*m*) ; and this doctrine is advanced by many foreign writers ; it therefore becomes necessary to observe here, that by the law of *England*, in the case of damage happening in this manner either to ship or cargo, by mere misfortune and without fault in any one, the proprietors of the ship or cargo injured must bear their own loss (*n*). I have already mentioned that such a misfortune is considered as a peril of the sea. And in this respect the law of *England* agrees with the Civil Law (*o*).

13. Hitherto we have considered the losses, which are to be compensated by general contribution, as being the price of safety, but this is not to be understood of absolute and perfect safety, by arrival and delivery at the port of destination. If temporary safety [343] be obtained by the loss ; if the ship survive the storm, or escape the enemy, and be afterwards cast away by another tempest, and goods be saved from the wreck, the clear value of the goods so saved must be contributory to the original loss, because without that loss even this diminished value would have had no existence (*p*).

The abandonment of goods on these occasions, although done by the act of man, is not considered to be so far voluntary as to divest the property of the merchant,

(*m*) Ordin. of *Oleron*, art. 14. of *Wisbuy*, *art.* 26. 50. 67. & 70. *French Ordinance*, liv. 3. tit. 7. *Des Avaries*, art. 11. and *Valin* thereon, and *Bynkershoek. Quest. Jur. Priv.* lib. 4. c. 18, 19, 20 & 21.

(*n*) *See* the case of *Buller v. Fisher*, ante, chap. 4. of this part, sect. 5.

(*o*) *Dig.* 9. 2. 29.

(*p*) *Dig.* 14. 2. 4. 1. *Vinnius in Peckium*, p. 246. 250.

and give a title to any person, who may find and save them: but from such person the merchant may reclaim them on payment of salvage (*q*); and if he is able to do so, their clear value is to be deducted from the contribution, or paid to the contributors.

It has been observed in a preceding part of this treatise (*r*), that when an entire ship is taken to freight by a merchant, the master must not take on board the goods of other persons without his consent: from whence I apprehend it will follow that if goods so wrongfully shipped be afterwards cast overboard to lighten the vessel, the merchant freighter ought not to contribute to the loss.

The French Ordinance in express terms excludes from the benefit of general average goods [344] stowed upon the deck of the ship (*s*): and the same rule prevails in practice in this country (*t*). Goods so stowed may in many cases obstruct the management of the vessel, and except in cases where usage may have sanctioned the practice, the master ought not to stow them there without the consent of the merchant. (1)

(*q*) *Dig.* 14. 2. 2. 8. & 14. 2. 8. In *Tucker v. Cappes*, 2 Roll. Rep. 498. *Mr. Justice Dodderidge* said the proprietor of the goods may bring an action of trover against the finder.

(*r*) *Ante*, chap. 1. of this part, sect. 8. *See* Ordin. of *Wisbuy*, art. 46.

(*s*) Liv. 3. tit. 8. *Du Jet.* art. 13.

(*t*) So proved in the causes of *Myer & others v. Vander Deyl*, Guildhall Sit. before *Lord Ellenborough*, Ch. J. *Dec.* 1803, and of *Backhouse & another v. Ripley* before *Chambre J.* a short time before.

(1) Goods shipped on deck and lost by jettison are not entitled to the benefit of general average. Smith & others v. Wright & others, 1 Caine's New-York Rep. 43.

14. In the SECOND place let us consider the articles, that are to contribute to make good these losses. And these are all merchandize conveyed in the ship for the purposes of traffick, whether belonging to merchants, to passengers, to the owner, or to the master, of whatever kind, and however small be their weight (*u*) in comparison to their value (*x*). For the contribution is made not on account of incumbrance to the ship, but of safety obtained. Therefore in this country bullion and jewels contribute according to their full value (*y*).

For slaves also, who are considered as a species of merchandize, their proprietors must contribute [345] according to their value (*z*); although this dreadful traffick has not extended so far as to authorize the casting of these unhappy persons into the sea, and making their loss an object of contribution (*a*). But as no estimation can be made of the value of the life of a free-man, neither passengers, nor crew, are to contribute for their personal safety (*b*). Neither in this country do the wearing apparel, jewels, or other things, belonging to the persons of passengers, or crew, and taken on board for their private use, and not for traffick, contribute on these occasions (*c*). And *Emerigon* informs us that the same practice prevails in *France*, although the ordinance of that country has not exempted these articles (*d*). Both the ship, and the freight gain-

(*u*) *Dig.* 14. 2. 2. 2. 1 *Magens*, p. 62, 63. *Emerigon*, tom. 1. p. 639.

(*x*) *Lord Kaim* admits this rule, but controverts its propriety, and contends that the contribution should be according to *weight* and not *value*. *Principles of Equity* p. 116. I cannot think his arguments satisfactory.

(*y*) 1 *Magens*, p. 62, 63.

(*z*) *Dig.* 14 2. 2. 2.

(*a*) *Emerigon*, tom. 1. p. 610. 646.

(*b*) *Dig.* 14. 2. 2. 2.

(*c*) 1 *Magens*, p. 62. 63. But by the *Civil Law* the rule was otherwise, *Dig.* 14. 2 2.2. and a contrary rule is also laid down in the *Guidon*, chap. 5. art. 26. upon which however *Cleirac* observes that the Ordinances of different states vary.

(*d*) Tom. 1. p. 645, &c.

ed in the voyage, are now every where contributory, although formerly in some countries contribution was made for the value of one only (*e*). But the owners do not contribute for the victuals or ammunition of the ship. In *France*, and many other of the continental states, contribution is made in some cases for the whole, in others for a moiety only of the value of the ship and of the gross freight (*e*). In this country the owners contribute according to the value of the ship at the end of the voyage, and the clear amount of the freight or earnings of the voyage, after deducting the [346] wages of the crew and other expenses of the voyage (1). The mariners do not contribute for their

(*e*) *See* the authorites cited by *Emerigon*, tom. 1. p. 648, *&c.* and Ordin. of *Wisbuy*, art. 40.

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(1) In cases of jettisons the same rule in respect to the value of the ship and freight in calculating their proportions of the contributions seems adopted in the State of New-York. And where a freight *pro rata* only has been earned, that, and not the freight which would have become due on delivery at the port of destination, has been adjudged to be the correct valuation. Maggrath, &c. v. Church, 1 Caine's New-York Rep. 196.

But in cases of general average on detentions *after capture*, a different rule has been adopted in New-York. For in such case the contribution has been apportioned in the following manner, viz. on the cargo valued at its first cost and charges at the port of departure ; on the vessel valued at four-fifths of her actual value at the same place exclusive of outfits ; and on the freight at one half the gross amount payable in the event of a successful performance of the voyage. It is admitted that this rule is in some degree arbitrary ; but it is considered on the whole as equitable as any that can be adopted. Leavenworth v. Delafield, 1 Caine's New-York Rep. 573.

wages, except in the single instance of the ransom of the ship (*f*). In this instance they are required to contribute in order to encourage resistance; in other instances they are exempted from contribution, lest the apprehension of personal loss should restrain them from the execution of the measures necessary to general safety and the peril and extraordinary hardships endured by them on these disastrous occasions well entitle them to an exemption from further distress.

15. LASTLY, as to the mode of contribution. By the Civil Law, the goods cast overboard were valued only at their invoice price or prime cost (*g*). A practice formerly prevailed in this country to adopt this valuation, if the loss happened before half the voyage was performed, but, if it happened afterwards, then to value the goods at the clear price, which they would have fetched at the place of destination (*h*); and this practice still exists in many places abroad (*i*); but here the last valuation is now adopted in all cases, where [347] the average is adjusted after the ship's arrival at the place of destination, and appears best to

(*f*) *Emerigon*, tom. 1. p. 642. *French* Ordinance, liv. 3. tit 4. *Des Loyers des matelots*, art. 20. and *Valin* thereon, who gives this construction to the word *omnes* in the sentence "si navis a piratis redempta sit, Servius Ofilius, Labeo, *omnes* contribuere debere aiunt." *Dig.* 14. 2. 2. 3.

(*g*) *Dig.* 14. 2. 2. 4.

(*h*) *Malyne*, page 113. *and Molloy*, book 2. chap. 6. sect. 6. *Wellwood*, tit. 21.

(*i*) *Emerigon*, tom. 1. p, 654, *Vinnius in Peckium*, p. 220.

But this rule applies only to cases of capture. And if a ship be so much injured by the perils of the seas as to render it necessary to sell her abroad, the amount she actually and *bona fide* sold for, is the value for which she contributes on a general average, and not the four-fifths of her original value, as in case of capture. Bell v. Smith, 2 John. Rep. 98.

agree with the nature of the subject (*k*); for although, as between the proprietor and the insurer of goods, the prime cost is the only value, the contract of insurance in that case being a contract of indemnity against loss, and not a contract for the security of gain; yet in this case equity requires that the person whose loss has procured the arrival of the ship at the place of destination, should be placed in the same situation with those, whose property has arrived at that place; which can only be done by considering *his* goods as having arrived there also. But if the ship in consequence of any misfortune to be sustained by general average, be compelled to return to its lading port, and the average be immediately adjusted, in this case the goods only contribute according to the invoice price: for the price of sale is unknown. And with regard to the loss of masts, cables, and other furniture of the ship, as the new articles purchased will in general be of greater value than the articles lost, it is usual to compound the difference by deducting one-third from the price of the new articles.

16. Supposing therefore a general average to be settled upon the ship's arrival at the port of destination, according to the principles before advanced, it is necessary in the first place to take an account of the several losses, which are to be made good by contri- [348] bution: in the second place, to take another account of the value of all the articles that are to contribute; in which must be included the value of the goods, &c. thrown overboard, for otherwise the proprietors of those goods will receive their full value and pay nothing toward the loss. But as this will be most easily understood by an example in figures, I propose the following

(*k*) It is also the rule of the Ordinance of *Wisbuy*, art. 39.

case; wherein the reader will suppose that it became necessary in the *Downs*, to cut the cable of a ship destined for *Hull*; that the ship afterwards struck upon the *Goodwin*, which compelled the master to cut away his mast, and cast overboard part of the cargo, in which operation another part was injured; and that the ship, being cleared from the sands, was forced to take refuge in *Ramsgate* harbour to avoid the further effects of the storm.

Amount of Losses.	£.
Goods of A. cast overboard	500
Damage of the goods of B. by the jettison	200
Freight of the goods cast overboard	100
Price of a new cable, anchor, and mast - 300	200
Deduct one-third - - 100	
Expense of bringing the ship off the sands	50
Pilotage and port duties going into the harbour and out, and commission to the agent, who made the disbursements	100
Expenses there	25
Adjusting this average	4
Postage	1
Total of losses	1,180

Value of articles to contribute.	£.
Goods of A. cast overboard	500
Sound value of goods of B. deducting freight and charges	1,000
Goods of C.	500
Of D.	2,000
Of E.	5,000
Value of the ship	2,000
Clear freight, deducting wages, victuals, &c.	800
Total of contributory values	11,800

[349]

£. £. £. £.

Then 11,800 : 1,180 : : 100 : 10 :

That is, each person will lose 10 per cent. upon the value of his interest in the cargo, ship, or freight.

	£.
Therefore A. loses	50
B.	100
C.	50
D.	200
E.	500
The owners	280

Total 1,180, which is the exact amount of the losses.

Upon this calculation the owners are to lose 280*l.*, but they are to receive from the contribution 380*l.* to make good their disbursements, and 100*l.* more for the freight of the goods thrown overboard, or 480*l.* minus 280*l.*

	£.
They therefore are actually to receive	200
A. is to contribute 50*l.*, but has lost 500*l.*; therefore A. is to receive	450
B. is to contribute 100*l*, but has lost 200*l.*; therefore B. is to receive	100
Total to be actually received	750

On the other hand C. D. and E. have lost nothing,	C.	50
	D.	200
And are to pay as before, *viz.*	E.	500
Total to be actually paid		750

which is exactly equal to the total to be actually received, and must be paid by and to each person [350] in rateable proportion to be ascertained by another calculation, with which it is unnecessary to trouble the reader.

In the above estimate of losses I have included the freight of the goods thrown overboard, which appears to be proper, as the freight of these goods is to be paid,

and their supposed value is taken clear of freight as well as other charges, although this article is omitted in the example proposed by *Pothier* (*l*). But I find it charged in an adjustment of general average given by *Magens* (*m*).

17. By the Civil Law the master of the ship was required to take care to have the contribution settled, and to receive the sums to be contributed, and pay them over to the losers, and might sue and be sued for them, or might retain the goods for the sums to be contributed by their proprietors (*n*). The same power of retaining the goods is given to the master by the French Ordinance, and even the further power of sale, under the authority of a magistrate, to the amount of the sums to be contributed (*o*). But *Valin* acquaints us, that this power is never in fact exercised in his country (*p*). Indeed, where contribution is to be made according to the price of the goods at the place of destination, the exercise of this power is incompatible with the mode [351] of adjustment. In this country, which has no peculiar forum established for these matters, but in which the practice of insurance is very general, it is usual for the broker, who has procured the policy of insurance, to draw up an adjustment of the average, which is commonly paid in the first instance by the insurers without dispute. In case of dispute, the contribution may be recovered either by a suit in equity (*q*), or by an action at law (*r*), instituted by each individual

(*l*) *Traite des Avaries*, Num. 133.
(*m*) 1 *Magens*, 289.
(*n*) *Dig.* 14. 2. 2. See *Wellwood*, tit. 21.
(*o*) Liv. 3. tit. 8. *Du Jet.* art. 21.
(*p*) Tom. 2. p. 211.
(*q*) *Shepherd & others v. Wright*, Shower's Parl. Cas. 18.
(*r*) *Marsham v. Dutrey*, Select Cases of Evid. 58. *Birkley & others v. Prestgrave*, 1 East. 220.

entitled to receive, against each party, that ought to pay, for the amount of his share. And in the case of a general ship, where they are many consignees, it is usual for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted (*s*).

(*s*) So deposed by a gentleman very conversant with this business in the case of *Myer & others v. Vander Deyl.* Guildhall, Sit. before *Lord Ellenborough*, Ch. J. Dec. 1803.

CHAPTER THE NINTH.

OF STOPPAGE IN TRANSITU.

1. WHEN goods have been shipped upon credit, and the consignee has become a bankrupt, or failed, the law, in order to prevent the loss that would happen to the consignor by the delivery of them, allows [352] him, in many cases, to countermand the delivery, and before or at their arrival at the place of destination to cause them to be delivered to himself, or to some other person for his use. This is usually called *stoppage in transitu.*

2. This practice was first sanctioned and established in the Court of Chancery (*a*), but has been since frequently recognized and carried into effect by the courts of law. It is founded on principles of natural justice and equity. But the law of *England* is in this respect more favorable to the transfer of property, the great subject of commerce, and less attentive to the interest of the seller of goods, than the ancient Civil Law, or the modern law of many European nations, which is chiefly founded on the Civil Law. For the Civil Law did not in general consider the transfer of property to be complete by sale and delivery alone, without payment or security for the price, unless the seller agreed to give a general credit to the buyer for it; but allowed the seller to reclaim the goods out of the possession of the buyer,

(*a*) In the cases of *Wiseman v. Vandeput*, 2 Vern. 203: *Snee v. Prescot*, 1 Atk. 245; and *D'Aguila v. Lambert*, Ambler, 399.

as being still the seller's own property (*b*). And by the general law of *France*, in the case of insolvency, "The seller, who has sold a thing, and [353] "still lies out of the money, which he was to "have for it, if he finds the thing, that he sold, in the "hands of the buyer, may seize on it, and he is not "obliged to share it with the other creditors of the "buyer. And it would be the same thing, nay, and "with much more reason, if the owner of the thing had "given" (delivered) "it to the debtor to sell for him" (*c*). Whereas by the general law of *England*, when *goods* have been delivered into the actual or constructive possession of the *buyer*, they cannot be reclaimed (*d*), although if found remaining unsold in the hands of an insolvent *factor*, they may be reclaimed, because a delivery to a *factor* does not of itself alter the property.

3. The law of *England* however will lend its aid to carry into effect the more enlarged rule of equity, which exists in another country, upon a transaction taking place there, as appears by the following case: By the law of *Russia*, "If, in case of unpaid debts or "bankruptcies, any body has reason to suspect [354] "that the debtor or bankrupt has any thoughts "of making the creditor lose, and therefore loadeth on

(*b*) Quod vendidi, non aliter sit accipientis, quam si aut pretium nobis solutum sit, aut satis eo nomine datum, vel etiam fidem habuerimus emptori sine ulla satisfactione. *Dig.* 18. 1. 19. *See* also *id.* eod. tit. 53. and *Dig.* 19. 1. 13. 8. and 14. 4. 5. 18.

(*c*) *Domat's* Civil Law, book 4. tit. 5. sect. 2. art. 3. See also the notes of the same author on that article, and on book 3. tit. 1. sect. 5. art. 3. Where it appears that by the custom of some parts of *France* a person, who has sold goods expecting to be paid immediately, may, if he is not paid, retake the goods even out of the possession of a subsequent purchaser.

(*d*) In case of a sale of *land*, if the purchase money is not paid, the Court of Chancery considers the purchaser as a trustee for the seller. *Pollexfen v. Moore*, 3 Atkins, 272, and see *Blackburn v. Gregson*, 1 Brown's Rep. in Chancery, 420.

"board of ship or vessel goods or cargo, in such a case "the creditor is to give notice in town (*e*) to the head "Judge of the Court, (in districts to the Chief,) that "the ship or vessel, or goods, or the whole cargo, should "be retained time enough until the full payment is "made to whom due." "In consequence whereof, and "by virtue of that law, if the seller or shipper, in case "of bankruptcies, can identify that the merchandize "belonging to him is in *Russia* in ships, warehouses, or "wherever they may be, in such a case the goods must "be given back to the sellers or shippers, *being their* "*property*, and cannot be brought in concurs" (*f*), that is, into the general mass of his effects to be distributed among his creditors. *Messrs. Bohtlingk & Co.* of *St. Petersburgh*, in pursuance of directions from one *Crane* of *London*, and as factors for him, shipped a cargo of Russian commodities at *St. Petersburgh* on board a ship *chartered by Crane*, and sent invoices thereof, and a bill of lading of part to him, but learning before the ship's departure that some bills, drawn by them on him in consequence of a previous transaction, were unpaid,

[355] *they procured from the master of the vessel bills of lading to their own order*, and sent them to a friend in *London*, and informed *Crane*, that he might have the bills of lading upon giving security to their friend for payment of the bills of exchange to be drawn for the amount of the goods, otherwise their friend would sell the goods on *Crane's* account, and apply the proceeds in discharge of the bills of exchange. *Crane* in fact had committed an act of bankruptcy before any of the goods were shipped; on the arrival of

(*e*) *Quære*, Whether this should not be "towns" or "a town?"

(*f*) Mercantile Navigation Laws of *Russia*, published 25th *June*, 1781, sect. 138.

the ship in *London*, his assignees demanded the goods of the master, and offered to pay the freight, &c. but the master delivered them to the friend of *Bohtlingk & Co.* on their account, in conformity to their indorsement of the bills of lading. Whereupon the assignees of *Crane* brought an action against the master: and the Court held, that the law of *Russia* in this case ought to prevail, although *Bohtlingk & Co.* had not actually taken the goods out of the ship, or instituted legal process for the recovery of them; considering the master's signature of bills of lading to their order to be equivalent to a stopping *in transitu* or re-delivery to them, and to have rendered it unnecessary for them to have recourse to the compulsory process of the law (*g*).

In this case recourse was had to the law of *Russia* to sustain the right of the consignor, because the ship had been chartered by the consignee, and it was then supposed that the right of stopping *in transitu* did not apply to the case of goods shipped on board a vessel of that description. The contrary however has] 356] been since decided in another case, that arose out of the same transaction (*h*).

4. But to return to the law of *England*. Let us consider, First, in what cases generally goods may be stopped *in transitu;* Secondly, under what circumstances goods are deemed to be *in transitu*, and what not; and, Lastly, By what acts the right of the consignor may be taken away, before the end of the transit.

First. It should be observed that the act of stopping *in transitu* is an adverse act on the part of the consignor against the consignee. If a consignee after an act of

(*g*) *Inglis & others v. Usherwood*, 1 East, 515.

(*h*) *Bohtlingk v. Ingliss*, 3 East. 381.

bankruptcy deliver up the bills of lading to another person upon his undertaking to apply the proceeds of the goods in discharge of bills of exchange drawn for the price, and he accordingly receive the goods, he cannot retain them against the assignees of the bankrupt, although the original consignor afterwards approve of the arrangement: and it seems that the law would be the same, even if the person with whom such an arrangement should be made, were at the time an agent of the consignor (*i*). But if the delivery of goods be countermanded by *the consignor*, the goods having been consigned upon credit, and *the consignee having failed or become bankrupt*, it is the duty of the master to obey the countermand, and deliver the goods, not to the [357] consignee, but to the order of the consignor.

Such countermand and substitution of a new consignee are most easily effected, if the bill of lading is originally made for delivery to the order of the consignor, because in that case the consignor may, if he has reason to suspect the failure, or is afterwards apprized of it, send another part of a bill of lading to a correspondent at the port of destination, indorsed in blank, or for delivery to him. But the countermand may also be made, in the event before-mentioned, if the consignee is originally named in the body of the bill of lading (*k*). For the right of stopping *in transitu* does not depend upon a supposition that the property has not passed from the consignor, but on the contrary is founded on an admission, that the property has become vested in some other person. No question can ever be made upon the right of a man to seize his own goods: but

(*i*) *Siffken & another v. Wray*, 6 East. 371.

(*k*) The assignees of *Burghall v. Howard*, 1 Hen. Bla. 565, *note a*.

the question in cases of stoppage *in transitu* generally is, whether under the circumstances the consignor may divest the property which has passed to another, and revest it again in himself (*l*).

5. A person abroad, who in pursuance of orders sent by a merchant of this country, purchases goods on his own credit of others, whose names are unknown to the merchant, and who charges the merchant a commission on the price, and consigns them to [358] him, is a consignor within the meaning of this rule; in reality he is the vendor, and the consignee the vendee (*m*). So also is a person who sends goods to be sold on the joint account of himself and the consignee (*n*). But a person who becomes surety for the consignee, by accepting bills drawn for the price of goods by the vendor, is not a consignor within this rule, although the bills be sent through his hands to the consignee (*o*).

6. If the consignor indorse and transmit the bill of lading in pursuance of an agreement, and in trust to indemnify against acceptances, or the like, he cannot countermand the delivery, and take back the goods, while the trust and object of the consignment remain unsatisfied; nor must the master re-deliver them to him (*p*). So if goods be sent by order of the consignee, on his account and at his risk, and the consignor draw bills of exchange upon him for the price, and indorse and transmit the bill of lading, the consignor cannot take possession of the goods at the place of destination

(*l*) See *Mr. Justice Buller's* opinion in *Lickbarrow v. Mason*, 6 East. 27, 28.

(*m*) *Fiese & another v. Wray*, 3 East. 93.

(*n*) *Newsom & another v. Thornton & another*, 6 East, 17.

(*o*) *Siffken & another v. Wray*, 6 East. 371.

(*p*) *Haille v. Smith & another*, 1 Bos. & Pul. 563.

and insist upon immediate payment as the condition of delivering them, the consignee being willing to accept the bills, and not having failed in his circumstances (*q*). (1)

[359] 7. This right of stopping goods *in transitu* does not belong to a person, who had only a lien upon them without a property in them. And therefore if a fuller or dyer, who has fulled or dyed cloths, and who is not obliged to part with the possession of them until the price of fulling or dying them is paid, put them on board a ship for delivery to his employer in pursuance of his orders, and the employer fail, the fuller or dyer cannot countermand the delivery, because his lien and right to retain the cloths ceased, as soon as he parted with the possession of them (*r*).

8. A consignor may exercise this right, although a part of the price of the goods has been paid by the consignee (*s*); or a bill of exchange has been accepted by him for the whole, and indorsed over to a third person (*t*). And an usage for land-carriers to retain goods as a security for the general balance of account due from the consignee, will not prevent the consignor from reclaiming them out of their hands, upon paying the price

(*q*) *Walley v. Montgomery*, 3 East. 585.
(*r*) *Sweet & another v. Pym*, 1 East. 4.
(*s*) *Hodgson v. Loy*, 7 Ter Rep. in K. B. 440.
(*t*) *Fiese & another v. Wray*, 3 East. 93.

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(1) And the right of stoppage in transitu is limited to cases of the insolvency of the consignees, and the goods cannot be countermanded on any other event. The Constantia, 6 Rob. Adm. Rep. 321., where Sir William Scott recognizes the general doctrine on this subject and elaborately explains it.

of the carriage of the particular goods only (*u*). Nor will a similar usage, when the carriage is to be paid by the consignor, authorize the carrier to detain goods from the consignee who has paid the price of them (*x*).

9. Secondly. Goods are deemed to be *in transitu* not only while they remain in the pos- [360] session of the carrier, whether by water (*y*), or land (*z*), and although such carrier may have been named and appointed by the consignee; but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee.

10. If goods are sent by sea to a certain port to be forwarded from thence by land to the residence of the consignee, and upon the ship's arrival at the port are delivered to a wharfinger, who receives them on the part of the consignee, to be forwarded to him accordingly; they are subject to this right of the consignor in the hands of the wharfinger (*a*); and the law is the same in case of delivery to a packer appointed by the buyer (*b*); unless the warehouse of the packer be used by the buyer as his own, and be the place of the ultimate destination of the goods (*c*). (1)

(*u*) *Oppenheim & another v. Russel*, 3 Bos. & Pull. 42.

(*x*) *Butler v. Woolcot*, 2 Bos. & Pull, N. R. 64.

(*y*) *Stokes v. La Riviere*, tried before *Lord Mansfield*, at Guildhall, cited 3 Ter. Rep. K. B. 466.

(*z*) *Hunter & another v. Beale*, tried before *Lord Mansfield*, at Guildhall, cited 3 Ter. Rep. K. B. 466.

(*a*) *Mills & another v. Ball*, 2 Bos. & Pull. 457.

(*b*) *Hunt & others v. Ward*, K. B. *cited* 3 Ter. Rep. K. B. 467.

(*c*) *Scott & others v. Pettit*, 3 Bos. & Pull. 469.

(1) And in a case where one Moisseron, the general agent in London of the house of Le Grand & Co. at Paris, and by them authorized to export for them to such markets as he should think

11. So, as I have before observed, the master of a ship, chartered wholly by the consignee, is now held to be a carrier in whose hands goods may be [361] stopped (*d*). But where a ship had been hired by the consignee for a term of years, and was fitted out, victualled, and manned by him, and goods were put on board thereof, to be sent by him on a mercantile adventure, for which he had bought them; it was held that the consignor could not stop them; he being in that case the owner of the ship *pro tempore*, and the delivery of the goods on board thereof being equivalent to a delivery into a warehouse belonging to him (*e*).

12. In a case of goods sent by a waggon, which arrived at the inn in London, where the waggon usually put up, and were there attached by a creditor of the

(*d*) *Bohtlingk v. Inglis*, 3 East. 381.

(*e*) *Fowler & another v. M'Taggart & others*, tried before *Mr. Justice Grose*, at *Bristol*, and cited 7 Ter. Rep. K. B. 442. and in the case mentioned in the text.

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fit, purchased goods in the name of Le Grand & Co. of the plaintiffs at Manchester, and directed them to be sent to the house of the defendant, who was a packer, and after their arrival there, Moisseron had some of the goods unpacked and sent away, and the remainder repacked, and while the goods so repacked remained at the defendant's house, news arrived that Le Grand & Co. had failed; the court were of opinion that the right of stopping in transitu was gone, and that the delivery to the packer was a delivery to Moisseron, and that the ulterior destination depended on him, and he might, if he pleased, have disposed of the goods in London according to his general authority. The goods therefore had arrived at the end of their journey. Leeds v. Wright, 3 Bos. & Pull. 320., and same case cited by Lord Alvanley in Scott v. Pettit, 3 Bos. & Pull. 469. above cited.

vendee, according to the custom of *London*, and which in that situation were claimed by his assignee, he having become bankrupt, and marked by the assignee, it was held that the vendor could not afterwards countermand the delivery: the goods being deemed to have arrived at the end of their destined journey; and the assignee to have done that, which was equivalent to taking actual possession; the removal of the goods being impracticable on account of the attachment (*f*). The question arose between the vendor and the assignee, who after a claim made by the vendor obtained a possession of the goods, the attachment being taken off.

13. Where a ship, which ought to have per- [362] formed quarantine, came into port without doing so, and the assignees of the consignee, who had received the bill of lading, but had become bankrupt, went on board immediately, and claimed the goods, and opened some of the chests, and put a person on board to keep possession, and the ship being on the same day ordered out of port to perform quarantine, an agent of the consignor, having received another bill of lading, claimed the goods of the master during the performance of quarantine: It was held by *Lord Kenyon*, at the trial of an action brought by the consignor against the assignees, who afterwards obtained possession of the goods, that the right of the consignor to stop the goods *in transitu* existed when the claim was made on his behalf, because the voyage was not at an end until the performance of the quarantine, and the consignee had no power to divest the right of stopping *in transitu*, by taking possession before the conclusion of the voyage. The plaintiff obtained a verdict, and the opinion of his lordship was

(*f*) *Ellis v. Hunt*, 3 Ter. Rep. K. B. 464.

afterwards sanctioned by the Court of King's Bench on an application for a new-trial. The doctrine of this case is in exact conformity to the tenor of a bill of lading, by which the master always engages to deliver the goods *at* the place of destination, and which therefore gives no authority to the consignee to demand them *before* their arrival at that place (*g*).

14. By an act of parliament made for securing [363] the duties payable upon the importation of wine, the proprietor, importer, or consignee is required within *twenty* days after the ship has been entered at the Custom-House, to make an entry of the wine, pay the duties, and land the wine; upon failure the wine is to be conveyed to the King's warehouse, and if the duties are not paid within *three* months, is to be publicly sold, to defray the duties and expenses, and the overplus (if any) is to be paid to the proprietor or other person authorized to receive the same (*h*). This statute has given occasion to a question upon the subject now under consideration. A quantity of wine arrived here consigned to *Leyland & Cragg*, by whom it was ordered, and who had accepted a bill drawn upon them for the amount. They did not enter, or pay the duties for it within *twenty* days, but before the expiration of that period became bankrupts, and the bill accepted by them was not paid. The wine was conveyed to the King's warehouse according to the statute. The assignees of *Leyland & Cragg* first, and after them an agent of the consignor, claimed the wine of the officers of revenue within the *three* months. The wine however was not delivered to either party, but was publicly sold

(*g*) *Holst v. Pownal & another*, 1 Espin. N. P. cases, 242.

(*h*) 26 *Geo.* 3. *c.* 59 *sect.* 4.

at the expiration of the *three* months, and the assignees of *Leyland & Cragg* brought an action against the broker for the overplus price. The question in the cause therefore was whether the claim [364] made by the agent of the consignor was a legal stoppage of the goods *in transitu, before they had come to the possession of the consignee;* and *Lord Kenyon*, before whom the cause was tried, held it to be so, and the plaintiffs failed in their suit (*i*). This doctrine was recognized and adopted by the present Learned Chief Justice of the Court of King's Bench, in a subsequent case relating to wine sent to the King's warehouse under this statute, which will be more fully stated for another purpose in a subsequent part of this chapter.*

In these last cases the claim was made before the time arrived at which the consignee had a right to take actual possession. In the case of the goods brought by the waggon to the inn, that time was arrived: the exercise of the right was alone prevented by an extrinsic circumstance wholly unconnected with the conveyance or delivery of the goods.

15. If the master has begun to unload, and has delivered part of the cargo to the consignee, the consignor's right to countermand is wholly at an end, and cannot be exercised over the residue of the cargo (*k*). And if the master has actually delivered the goods to the person by whom they were ordered, and at whose risk they were to be imported, the consignor cannot reclaim, them, although the bill of lad- [365] ing was for delivery to the consignor, and was

(*i*) *Northey & another v. Field*, 2 Espin. N. P. cases, 613.

(*k*) *Sluby & another v. Heyward & others*, 2 Hen. Blac. 504. See also *Hammond & others v. Anderson*, 1 Bos. & Pull. N. R. 69.

* Post. p. 376. *s.* 22.

unindorsed, and the bill of exchange drawn for the price has been dishonoured (*l*). (1) In such a case the propriety of the delivery as between the consignor and the master seems doubtful.

16. LASTLY, we are to consider by what acts the right of the consignor may be taken away, before the end of the transit.

The bill of lading in all its usual forms contains the word "*assigns*," but it will be proper to advert again to the different forms in common use. Sometimes it is made for delivery to the consignor by name, or assigns; sometimes to order, or assigns, not naming any person; and at other times to the consignee by name, or assigns.

(*l*) *Coxe & others v. Harden & others*, 4 East. 211.

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(1) This was a case where the consignor of goods abroad upon receipt of orders from his correspondent here, shipped goods on the account and at the risk of the consignee, and took bills of lading from the captain, making the goods deliverable to consignors order, and sent one *unindorsed* to the consignee, and informed him that he had drawn upon him for the amount; and the consignor by way of precaution, sent also another bill of lading indorsed to his own agent, it was held that, upon the shipment on the account and at the risk of the consignee, the property of the goods vested in him subject only to be divested by the consignor's stopping them while in transitu; and that upon the arrival of the goods, the consignee having obtained possession of them from the captain by the production of his *unindorsed* bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without a competent authority from the shipper, and however answerable the captain might be to the shipper on that account Coxe, &c. v. Harden, &c. 4 East. Rep. 211.

In the two first cases, the consignor either transmits it without any indorsement, or indorses his own name generally upon it, without mentioning any other person; or indorses it specially for delivery to a person named by the indorsement. Occasionally too, particular conditions or restrictions respecting the delivery are mentioned in the indorsement. It will be immediately perceived that in this respect there is a strong resemblance between this instrument and a promissory note. The

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Where persons are in the course of ordering goods to be sent to certain persons, their agents, at a particular place on their account for the purpose of being afterwards sent to their correspondents abroad; and they send an order to the defendants for certain goods to be sent to their agents, &c. *to be shipped to their correspondents abroad as usual*, it was held that as between buyer and seller the right to stop the goods in transitu ceased, when the goods came to the possession of the agents at the place of their abode; for the goods were then to receive a new direction from the vendees, according to their orders to their agents. Dixon & others v. Battier & others, 5 East, Rep. 175.

So where a number of bales of bacon were sold for an entire sum, payable by a bill at two months, and an order was given to the wharfinger to deliver them to vendee, who went to the wharf, weighed the whole and took away several bales and then became bankrupt, and then the vendor gave orders to the wharfinger not to deliver the residue; it was held that the vendor had no right to stop the residue, notwithstanding by the custom of the trade the charges of warehousing were to be paid for by the vendor for 14 days after the sale. Where part of the goods sold by an entire contract are taken possession of, the vendee has taken possession of the whole. Hammond & others v. Anderson, 1 New Rep. 69. cited above.

mere possession of a promissory note made payable to another person and not indorsed by him gives the holder no power to indorse over the note. Nor
[366] ought the mere possession of a bill of lading, made for delivery to the consignor and not indorsed by him, to induce any one to believe that the holder is authorized to dispose of the goods. On the other hand, if the bill of lading be originally made for delivery to the consignee ; or being made for delivery to the consignor or assigns, or to order or assigns, be indorsed by the consignor, either to a third person by name, or generally without designating any person, it may on the first view be thought that the person named in these two first cases, or who is the holder of the instrument in the latter case, has authority to dispose of the goods, as he may think proper.

In what follows the word *consignee* will be used to denote such a person, and the bill of lading spoken of is to be understood as falling within one of these three descriptions last mentioned, unless the contrary is pointed out.

In point of practice it frequently happens that the consignee, having received the bill of lading, sells the goods for a valuable consideration, or raises money upon them, before their arrival, and delivers over the bill of lading to a third person, who is wholly ignorant of the nature or terms of the consignment, and does not know that the consignee is not absolutely entitled to receive and dispose of them : under such circumstances a very important question of law has arisen upon the right of the consignor to countermand the deliv-
[367] ery as between him and the person to whom the bill of lading has been thus delivered, without any fraud or collusion.

Of the frequency of the practice to assign bills of lading among merchants, and the convenience of the practice in many cases, there is no doubt; but not every mercantile practice of frequent use and even of general convenience is, or ought to become, in all its consequences, a part of the law of the land; for if such a rule were adopted, the law must in many cases depart from its own principles, and vary with the varying fashions of the times; nevertheless the law does adopt into its own bosom many of the ancient customs and usages of merchants, and stretch forth its arm to assert and maintain them, when they are found consonant to legal reason and legal wisdom, and most especially when they are calculated to promote honesty and to prevent fraud. And upon the subject now under consideration the question is, what extent of legal right the act of the consignee confers upon his assignee. The earliest mention of this subject in our law books is in the case of *Evans v. Marlett* (*m*), in which *Holt*, Chief Justice, said, "the "consignee of a bill of lading has such a property that "he may assign it over." And *Shower* said, "that it "had been adjudged so in the Exchequer." But in this case the question upon the effect of such an assignment was not properly before the Court, and does not appear to have been discussed or argued; and the case supposed to be referred to by *Shower* [368] has not been found. In the case of *Snee v. Prescott*, before cited, the right of the pawnee of the bill of lading as against the consignor was not noticed or insisted upon. In the case of *Appleby v. Pollock*, which was

(*m*) 1 Ld. Raym. 271. 12 Mod. 156. 3 Salk. 290. but the report in *Salkeld* does not contain this dictum.

tried before *Chief Justice Lee* at Guildhall (*n*); it appeared that one *Brand* shipped certain goods at *Leith*, and consigned them to one *Stratton* in *London*. *Stratton*, as soon as he received the bill of lading, by indorsement thereon assigned the goods to the plaintiff for 160*l*., and soon afterwards became a bankrupt. *Brand*, hearing of the bankruptcy, took process out of some Court in *Scotland* to attach the goods in the hands of *Pollock* the master of the ship: but the ship having left *Leith*, the process was executed at sea. Upon the arrival of the ship at *London*, the master refused to deliver the goods to the plaintiff *Appleby*, unless he would indemnify him against the process in *Scotland*, and thereupon *Appleby* brought the present action to recover the value of the goods. At the trial of the cause the Chief Justice declared himself to be of opinion that the assignment gave the plaintiff a sufficient property to maintain the action, if under the circumstances he was entitled to do so. The general question upon the right of the consignor to stop the goods and counter-
[369] mand the delivery, as against an assignee of the bill of lading, does not appear to have been agitated: parol evidence was given, that by the law of *Scotland* if goods are arrested the holder must give security not to part with them, and the defendant relied on the effect of the process, by which these goods were attached: as to which the Chief Justice said, "if the "process could have attached these goods, it could only "have done so within the jurisdiction of the Court, and "it does not appear that the place where the goods were

(*n*) Trin. T. 21 *Geo.* 2. This case, which is here quoted from two manuscript notes taken by different persons, does not appear to have been noticed in any of the subsequent cases. In one of the notes the process is said to have issued out of the Admiralty Court in *Scotland*.

"attached was within the jurisdiction of the Court; "and it lay upon the defendant to make that out." And the Chief Justice therefore directed the Jury to find a verdict for the plaintiff to the value of the goods. In the case of *Wright v. Campbell* (*q*), which arose on a consignment of goods to one *Swannwick*, who was the factor of the consignor, and who by indorsement assigned the bill of lading to a third person, *Lord Mansfield*, said, "If the goods are *bonâ fide* sold by the factor at "sea (as they may be where no delivery can be given) "the sale will be good: the vendee shall hold them by "virtue of the bill of sale, though no actual possession "is delivered; and the owner can never dispute with "the vendee, because the goods were sold *bonâ fide*, and "with the owner's own authority;" but the Court, thinking there was reason to believe the [370] assignment to have been fraudulent, sent the cause to a second trial, in order that the Jury might determine that point. In the case of *Caldwell v. Ball* (*r*), it was considered by the Court, that a bill of lading is assignable in its nature, and that by indorsement thereof the property vests in the assignee; but that case did not properly turn upon the effect of the assignment as between the consignor and the assignee; and was decided upon the ground that the defendant, the master of the ship, had discharged his duty by delivering the goods to the person, to whom the consignor had first indorsed the bill of lading, and who appeared upon the whole to have the better title; the right of stoppage in transitu, or the devestment of that right not being in question.

(*q*) 4 Burr. 2046. 1 Bla. Rep. 628. According to the report in Blackstone, *Mr. Justice Yates* expressed a doubt "whether an assignment of a bill of lading made "it negotiable in the same degree "as a bill of exchange."

(*r*) 1 Ter. Rep. K. B. 205.

In the case of *Hibbert v. Carter* (*s*), which happened very soon afterwards, and was a question of interest as requisite to sustain an action upon a policy of insurance, the Court thought that the indorsement of the bill of lading by the consignor to a third person absolutely transferred the property, until it appeared to have been made only for the purpose of binding the net proceeds as a security for a pre-existing debt, and that the consignor was not intended to be discharged from the debt, if the goods had perished on the voyage.

17. Shortly after this last determination the [371] question now under consideration was brought before the Court of King's Bench for decision as the point and hinge of the cause of *Lickbarrow & others v. Mason* (*t*), in which case it appeared that *Messrs. Turing & Co.* had shipped goods at *Middleburgh* for *Liverpool*, by the order of one *Freeman* of *Rotterdam*, and drawn bills of exchange upon him for the price, and taken from the master three bills of lading for delivery of the goods to order or assigns, two of which they indorsed in blank, and transmitted them together with an invoice to *Freeman* at *Rotterdam*, who sent them and the invoice to the plaintiffs at *Liverpool* in the same state in which he received them, that they might receive and sell the goods on his account, they drew bills of exchange upon them to nearly the amount. *Freeman* and the plaintiffs accepted the bills of exchange drawn upon them respectively; but between the ship's departure and her arrival at *Liverpool*, *Freeman* became a bankrupt and absconded, and *Turing & Co.* sent

(*s*) 1 Ter. Rep. K. B. 745.

(*t*) 2 Ler. Rep. K. B. 63. The facts appear upon the plaintiff's evidence, to which the defendants demurred. See the very learned opinion delivered by *Mr. Justice Buller* in the House of Lords, 6 East. 21. *notis.*

another of the bills of lading to the defendants, indorsed specially for delivery to them; and they thereupon obtained the goods from the master. *Turing* & *Co.* afterwards paid the bills of exchange drawn by them upon *Freeman*, and the plaintiffs paid those, which had been drawn upon them by *Freeman*. The Court, after solemn argument and deliberation, held that [372] by an assignment made by the consignee *for a valuable consideration*, and without notice to the assignee that the goods were not paid for, the property was absolutely transferred to the assignee, and that the consignor was by such assignment deprived of the right to stop the goods in transitu, which as against the original consignee he might have exercised. From this decision an appeal was made by writ of error to the Judges of the Courts of Common Pleas and Exchequer (*u*), who reversed the judgment of the Court of King's Bench; holding that the assignment gave to the assignee no other right or title than that, which the consignee himself possessed, and consequently that the consignor had a right to stop the goods, and prevent their delivery to the assignee. This judgment was by a second writ of error brought before the House of Lords; but their Lordships thinking the facts of the case were not laid before them in such a manner as to warrant a decision of the point of law, directed the cause to be tried again by a Jury, in order to remedy that defect. It was accordingly tried again, and the Court of King's Bench, (at the head of which *Lord Kenyon* had in the meantime been placed, and who had in another cause (*x*) expressed his approbation of the first judgment in this

(*u*) 1 Hen. Black. 357.

(*x*) *Solomons v. Nissen*, 2 Ter. Rep. K. B. 674.

case, as being founded upon principles of policy and common honesty), again decided the case without [373] argument in conformity to the first decision of that Court; and in order that the question might again be carried to the other tribunals (*y*); another writ of error was brought, but it was afterwards abandoned; and it is now the admitted doctrine in our Courts, that the consignee, may, under the circumstances before stated, confer an absolute right and property upon a third person, indefeasible by any claim on the part of the consignor. At the second trial of this cause it was the opinion of the Jury, and was stated to be so in the verdict, that by the custom of merchants' bills of lading, expressing goods to have been shipped by any person to be delivered to order or assigns, are, before the ship's arrival, negotiable and transferrable by him to any other person by his indorsing his name, and delivering or transmitting the same so indorsed to such other person; and that by such indorsement, delivery, and transmission to such other person, the property is transferred to such other person. And evidence to the same effect was given at a trial in a subsequent case (*z*).*

18. But it must not be understood that the consignee can in *all* cases by his subsequent indorsement, or delivery of the bill of lading to a third person, for a valuable consideration, and without fraud defeat the right of the consignor to stop the goods. The nature and

(*y*) 5 Ter. Rep. K. B. 683.
(*z*) *Haille v. Smith*, 1 Bos. & Pull. 563.

* See post, p. 375. note, the case of Cuming v. Brown, 9 East. Rep. 506.

object of the consignment, and the character of the consignee, must be attended to. If the [374] goods be sent to the consignee as a purchaser, he may either sell or pledge them before their arrival, and if the bill of lading has by its form required and received the indorsement of the consignor, a second indorsement by the consignee is not necessary to perfect the transaction between him and the third person. This will appear by attending to the facts of the case of *Lickbarrow v. Mason*. *Freeman* the consignee was a purchaser from *Turing & Co.* the consignors; *Freeman* did not sell the goods to *Lickbarrow & Co.* the plaintiffs, but authorized them to receive the goods and sell them on *his* account, obtaining from them their acceptance of his bills of exchange on the credit of the bills of lading, and the expectation that they might repay themselves out of the proceeds of the goods. The bills of lading were for delivery to order or assigns, were indorsed generally by *Turing & Co.* the consignors, and were not again indorsed by *Freeman* the consignee.

19. On the other hand, if the goods be sent to the consignee as a factor, his possession of the bill of lading cannot in reason give him any greater power over the goods before their arrival, than his actual possession of them afterwards would do: and as in the case of actual possession, although a factor may sell the goods and thereby bind his principal, because his employment and authority are to sell; but cannot pawn or pledge them, because he is not by his employment authorized so to do; so before the arrival of the goods, he [375] cannot devest the consignor's right to stop them, by indorsing or delivering over the bill of lading

as a pledge. This last point has been solemnly decided by the Court of King's Bench (*a*). (1)

20. Indeed the indorsement of a bill of lading is not properly an actual transfer in itself, of the goods therein mentioned, but is rather to be considered as evidence, or as an act raising a presumption, of such a transfer; and consequently the object and legal effect of the indorsement may be ascertained by other circumstances. Therefore where a bill of lading was indorsed and transmitted by the consignor to an agent, without valuable consideration, to enable him to receive the goods therein mentioned, for the use of the consignor, in case the consignee should fail; it was doubted whether the agent could maintain an action at law for the goods in his own name. The Court appeared inclined to think, that he could not, but the cause in which the point arose, was decided on another ground (*b*). (2)

(*a*) *Newsom & another v. Thornton & another*, 6 East. 17.

(*b*) *Coxe v. Harden*, 4 East. 211.

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(1) In this case goods were consigned on the joint account of the consignors and consignee, and a bill of lading was sent to deliver the goods to the consignee or his assigns, who afterwards indorsed and delivered it to third persons, upon condition of their making an advance on it, which they failed to do, and retained it as security for prior advances; it was held that such indorsement and delivery of the bill of lading did not devest the consignors' right to stop the goods in transitu upon his insolvency. Newsom & another v. Thornton & another, 6 East. Rep. 17.

(2) In Cuming v. Brown, 9 East. Rep. 506., the Court decided that the property of goods passes by the indorsement and delivery of the bill of lading by the consignee to a *bona fide*

21. And as on the one hand, the indorsement or delivery of the bill of lading by the consignor, does not *necessarily* enable the consignee to devest the consignor's right of stopping in transitu, so on the other hand, there may be circumstances equivalent to such indorsement and delivery, which may enable [376] the consignee to do this. As where *Thompson & Co.* sent goods from *Ireland* to *London*, to be sold by *Eustace & Holland* their factors there, and wrote to them to insure the goods, and sent them a bill of lading not indorsed, but having the names of *Eustace & Holland* on the back, and being applied to by them for an indorsement, answered by letter that if the bill of lading was not indorsed, it was a mistake, and they would send an indorsement; upon which *Eustace & Holland* sold the goods; and it afterwards happening that they were unable to pay bills drawn upon them by *Thompson & Co.* on the general account, one *Dick* paid those bills for the honour of the drawers, and knowing all these transactions applied to them for an indorsement of the bill of lading, which they sent him; and *Dick* thereupon demanded the goods of the master of the ship, who refused to deliver them to him, but delivered them to the vendees of *Eustace & Holland;* upon this *Dick* brought an action against the master, which was tried before *Lord Kenyon*, and his Lordship ruled that the plaintiff

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purchaser for a valuable consideration and without collusion, although the purchaser at the time knew that the consignor had received only acceptances, payable at a future day from the consignee for the amount, and that therefore in such case the consignor's right of stoppage in transitu was devested.

had, under such circumstances, no right to take the goods out of the possession of the vendees of *Eustace & Holland; Eustace & Holland* being factors authorized to transfer the property in them, and having actually done so (*c*).

22. In the case last quoted there were special facts, which were considered as equivalent to an in-
[377] dorsement of the bill of lading by the consignor.

But if there be not such facts, and the bill be for delivery to order or assigns, and transmitted unindorsed, the holder thereof cannot by an attempt to transfer the property of the goods to a third person, devest the right of the consignor to stop them in transitu. This will appear by the following case. One *Fox*, a wine merchant at *London*, having ordered five pipes of wine from *Messrs. Abbott & Co.* of *Oporto*, they loaded them on board a vessel bound for *London*, and took from the master bills of lading for delivery to order or assigns. One of these bills they transmitted to *Fox* in a letter, wherein they said they had shipped the wine on his account, had sent him a bill of lading, and drawn upon him for the price. *Fox* accepted the bill of exchange thus drawn upon him, which was payable nine months after date. Before the bill of exchange became due, the wine arrived, and *Fox* not being able to pay the duties, it was sent to the King's warehouse, under the statute 26 *Geo.* 3. *c.* 59.; while it remained there, *Fox* being indebted to one *Mary Nix*, and called upon for payment, and unable to pay, sold the wine to her for 40*l.* then paid to him, and the amount of his debt. He became bankrupt soon afterwards; and the agents of the consignors having paid the duties and obtained

(*c*) *Dick v. Lumsden*, Peake's N. P. Ca. 189.

the goods, *Mrs. Nix* brought an action against them for the value. The cause was tried before *Lord Ellenborough;* and it was insisted on behalf of the plaintiff, that there was no difference between [378] the indorsement of a bill of lading by the consignor, and the sending it inclosed in a letter of this import. But his Lordship declared himself to be of a different opinion, and held that the right of the consignor to stop the goods, was not devested under these circumstances (*d*).

23. By the law of *France* (*e*) the right of the vendor, or of the person, who has advanced money at respondentia on the specific security of goods, cannot be devested by an assignment of the invoice or of the bill of lading, although the same law in favour of commerce gives to such an assignment, if free from fraud, the effect of devesting the right of the general creditors of the assignor to obtain possession of the goods in discharge of their debts; contrary to its own policy in other cases, which requires actual delivery of possession in order to effect this purpose, according to its general maxim, that a mere assignment does not vest the property, *simple transport ne saisit* (*f*). And the Ordinance, as I have already observed (*g*), expressly declares that the sale of a ship at sea shall not prejudice the creditors of the vendor.

24. But in cases of this nature, an important and dif-

(*d*) *Nix v. Olive*, ante, page 364. Sit. at Guildhall, before *Lord Ellenborough*, Ch. J. after T. T. 1805.

(*e*) *Valin* on the *French* Ordinance, liv. 2. tit. 10. *Des Navires*, art. 3.

(*f*) Liv. 2. tit. 10. *Des Navires*, art. 3.

(*g*) *Ante*, part 1. ch. 1. sect. 6.

ficult question of fact may arise upon the fair-
[379] ness and honesty of the assignment; and even as between the consignor and the original consignee the right to stop the goods may be doubtful in the particular circumstances of the case; and it would be a great hardship upon the owners and masters of ships, if they were obliged to exercise a judgment upon these doubtful matters of fact, and to decide upon them, and deliver the goods at their own peril. But I apprehend the law does not altogether cast this burthen upon them. In the case of *Caldwell v. Ball*, which I have quoted just before, it was held that the master had discharged himself by delivering the goods to the person, to whom the consignor first indorsed the bill of lading; but in that case the question arose between two consignees, to each of whom a bill of lading had been indorsed, and there had been no countermand or attempt to stop in transitu, and the master happened to know the priority of indorsement, which was substantially to the owners of the ship, whereas it may often be out of the power of the master to inform himself satisfactorily of the priority of indorsement. In an earlier case, which was tried before *Chief Justice Lee* at Guildhall, and which was an action brought by the assignee of the original consignee against the master, who had delivered the goods to the person, to whom the consignor had sent another bill of lading as a security, and to enable him to take possession of the goods on his behalf, if the consignee should fail, which had been the case; it appeared in evidence by the testimony
[380] of merchants and masters of ships, that by usage, in the case of indorsement of bills of

lading to different persons, the master was at liberty to deliver to whichever he thought proper; and upon that ground, the Chief Justice directed the Jury to find their verdict in favour of the defendant, and they accordingly did so (*h*). But perhaps this rule might upon further consideration be held to put too much power into the master's hands, and it might in some cases be inconsistent with the acknowledged right to stop in transitu, and defeat the beneficial exercise of it. And it may be collected from the decision of a late case (*i*), that if the master, being required to deliver the goods to an agent of the consignor, either expressly engage to do so, or say that he will not part with them, until he is certain of a safe delivery, and afterwards deliver them to the consignee or the persons claiming under him, he will be responsible to the consignor, provided it shall turn out that the consignor was legally entitled to countermand the delivery and take back the goods.

25. In general, where two opposite parties claim a right to receive the goods, both or either of them will be willing to give an indemnity to the master; and the master should in prudence deliver the goods to the party, upon whose indemnity he can most safely rely. But if a satisfactory indemnity is not offered, and the master must exercise a discretion; then if [381] the bill of lading has not been assigned over by the consignee, and he has failed, without doubt the master should deliver to the person, who claims for the use of the consignor. If the consignor has indorsed bills

(*h*) *Fearon v. Bowers*, 1 Hen. Blac. 364. *note.*

(*i*) *Mills & another v. Ball.* 2 Bos. & Pull. 457. The defendant was a *wharfinger*; but the doctrine applies equally to the case of a *master.*

of lading to different persons, as was the case in *Caldwell v. Ball*, the master should deliver to the person, to whom the consignor first made the indorsement. If the consignee has assigned the bill of lading, and the validity of the assignment be questionable; it seems most proper for the master to deposit the goods in a place of safety, and apply to the Court of Chancery by way of interpleader, to compel the contending parties to litigate their rights by an action between themselves.

CHAPTER THE TENTH.

OF SALVAGE.

1. HAVING thus treated of the rights and duties arising out of the contracts between the ship-owner and merchant, it seems proper in the next place to consider a subject, which the dangers of navigation frequently render interesting to both alike; namely, the compensation that is to be made to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss. This compensation is known by the name of [382] *salvage*, and at present is commonly made by a payment in money, but in the infancy of commerce was more frequently made by the delivery of some portion of the specific articles saved or recovered.

All foreign codes of maritime law, both ancient and modern, contain provisions and enactments on this head. In some of them the value to be paid is fixed at a certain portion of the articles saved, or of their value, according to their nature and quality, or the circumstances of the case. But it is obvious that positive and settled rules are little adapted to the administration of justice in varying and unsettled cases; and what can be more various and unsettled, than the degrees of labor experienced on the ocean, or the degrees of peril, to which persons, who engage in the meritorious task of assisting the distressed on that element, are at different times exposed? and therefore in the case of wreck or derelict

at sea, the law of England, like the law of some other countries, has fixed no positive rule or rate of salvage, but directs only as a general principle that a reasonable compensation shall be made (*a*). (1) The legislators of all civilized and commercial states in modern [383] times (*b*), have laboured earnestly to repress by due severity of punishment, the barbarous spirit of plundering the helpless and distressed mariner, whose situation calls for assistance and relief. And very salutary provisions have been made on this subject by the wisdom of our own parliaments (*c*), but which I shall forbear to detail, as not properly belonging to my subject, and proceed to the consideration of salvage, FIRST, with regard to the effects preserved from the perils of the sea; and SECONDLY, with regard to effects retaken from an enemy, into whose hands they may have fallen.

2. A person, who by his own labor preserves goods, which the owner, or those intrusted with the care of them, have either abandoned in distress at sea, or are

(*a*) In the case of *derelict* becoming the property of the crown, it was formerly the settled practice of the Court of Admiralty to give a moiety to the finders or salvors, but the practice has been long disused, and the reward become discretionary. Case of the AQUILA, 1 Rob. A. R. 37. *Wellwood's* Sea Laws, tit. 24.

(*b*) I have used the words "*in modern times*," because formerly the claim of the sovereign power in some countries was not less barbarous than the temper of the inhabitants. See *Valin's* preface to tit. 9. of book 4. of the *French Ordinance*.

(*c*) See the statutes 3 *Ed.* 1. c. 4. 4 *Ed.* 1. stat. 2. sect. 2. 12 *Ann*, stat. 2. c. 18. and 26 *Geo.* 2. *c.* 19. 1 Blac. Com. c. 8. s .11.

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(1) Where the amount of salvage is not fixed by positive law, it must be determined by the principles of general law, and is discretionary under all the circumstances of the case. Talbot v. Seaman, 1 Cranch's Rep. 1.

unable to protect and secure, is entitled by the common law of *England* to retain the possession of the goods saved, until a proper compensation is made to him for his trouble (*d*). This compensation, if the parties cannot agree upon it, may by the same law be ascertained by a jury in an action brought by the salvor against the proprietor of the goods: or the proprietor may tender to the salvor such sum of money as he thinks sufficient, and upon refusal to deliver the goods, bring an action (*e*) against the salvor; and if the Jury think the sum tendered sufficient, he will recover his [384] goods or their value, and the costs of his suit.

If the salvage is performed at sea, the Court of Admiralty has jurisdiction over the subject, and will fix the sum to be paid, and adjust the proportions, and take care of the property pending the suit; or if a sale is necessary, direct a sale to be made, and divide the proceeds between the salvors and the proprietors according to equity and reason. And in fixing the rate of salvage, this Court usually has regard not only to the labor and peril incurred by the salvors, but also to the situation, in which they may happen to stand with respect to the property saved, to the promptitude and alacrity manifested by them, and to the value of the ship and cargo, as well as the degree of danger, from which they were rescued (*f*). In the case of a homeward bound *West-India* ship taken by the *French*, near the Coast of *Jamaica*, while proceeding from *Savannah le Mar* to *Bluefields* to join convoy, and re-captured by persons going

(*d*) *Hartfort v. Jones* 1 Ld.Raym. 393. *Baring & others v. Day*, 8 East. 57.

(*e*) *Viz.* of *detinue* or *trover*.

(*f*) The WILLIAM BECKFORD, *Muirhead*. At the Delegates, 17th and 24th Nov. 1801. MS. 3 Rob. A. R. 355. S. C.

in boats from the shore, *one-sixth* was allowed for salvage; and as the voyage homeward, and consequently the right to freight, had commenced, and the freight was ultimately earned, the salvage was paid upon the freight as well as the ship and cargo (*g*). (1)

In the case of a slave ship rescued from insurgent slaves on the coast of *Africa*, by another vessel employed in the same trade, *one-tenth* of the value was [385] allowed (*h*). In the case of a *Danish* ship, deserted by its crew on the *English* coast, and brought into *Harwich* without any considerable danger, *two-fifths* were decreed for salvage (*i*). In the case of another ship, which having struck upon a rock, lost her rudder, had her bottom beaten in, and been deserted by

(*g*) The DOROTHY FOSTER, 4 Rob. A. R. 223. *Sweden*, 6 Rob. A. R. 88.
(*h*) The TRELAWNEY, *Lake*, A. R. 196.
(*i*) The FORTUNA, *Quest.* 4 Rob. A. R. 193.

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(1) In Talbot v. Seaman, 1 Cranch Rep. 1, the supreme court of the United States decreed payment of one third of the nett value as salvage. In Mason & others v. Ship Blaireau, 2 Cranch 240, the same Court decreed one third of the gross value as salvage and one third of the salvage to the owners of the saving ship; and in the case of the ship Mary Ford, 3 Dallas' Rep. 188, the same court decreed one third of the gross value as salvage, and two thirds of that to the owners of the saving vessel. In the case of the brig Jefferson stated in Post & another v. Robertson, 1 Johns. N. York Rep. 24, the district court of New York decreed one half of the nett proceeds as salvage. These cases are cited only to shew that here, as in England, the amount of salvage is discretionary, and that the Courts are liberal in the allowance of it. See also 4 Cranch. Rep. 347.

the crew, was weighed off with great peril by one set of persons, and placed in such a situation as to enable the master to bring off some bullion, but which afterwards sunk, and was again weighed up and brought into *Harwich* by another set of persons, *two-thirds* were decreed, and the amount distributed rateably among the first and second set of salvors (*k*). But the Court will not suffer a claim of salvage to be ingrafted on the local ignorance of foreigners, who cannot be expected to be well acquainted with our coast, although a recompence must be made for the service actually rendered to them (*l*). Neither is a passenger entitled to make a claim for the ordinary assistance he may be enabled to afford to a vessel in distress; it being the duty, as well as the interest, of all persons on board of every description, to contribute their aid on such an occasion. A passenger however, is not bound to remain on board the ship in the hour of danger, but may quit it, if he has an opportunity to do so: much less is he required to take upon himself any responsibility [386] as to the conduct of the ship. And therefore in the following case, a passenger was permitted to recover a very considerable sum for extraordinary services performed, and responsibility incurred. A ship bound to the *West-Indies*, struck upon the shoals of *Chichester*, in a gale of wind, and in that situation was deserted by the master, who took part of the crew with him. A person who had commanded vessels in the same trade, and was then on board as a passenger, took the command of the ship, by the desire of the passengers, and with the consent of the mate and the remain-

(*k*) The JONGE BASTIAAN, *Steyting*, 5 Rob. A. R. 322.

(*l*) The VROUW MARGARETHA, *Jacobs*, 4 Rob. A. R. 103.

der of the crew, and carried her back in safety to *Ramsgate* harbour. The owner approved of his conduct, and in a letter to the underwriters, attributed the preservation of the ship to his skill and management, and intimated that he thought 200*l*. the lowest compensation that could be made to him; this was done under an expectation that the remuneration might form a part of a general average. At the trial of the cause, the Chief Justice, *Lord Alvanley*, said he was inclined to think the plaintiff was entitled to be paid something for his service, as he appeared to have placed himself in a situation of responsibility, and would have been answerable for neglect or misconduct. The Jury gave 400*l*. An application was made to the Court of Common Pleas in the ensuing term to set aside the verdict, but the Court refused to do so (*m*). (1)

(*m*) *Newman v. Walters*, 3 Bos. & Pull. 612.

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(1) Lord Alvanley in delivering the opinion of the court in this case, said, "But if a passenger go beyond the line of his duty, if he take upon himself the direction of the ship and make himself responsible in the same manner as if he were master, he is entitled to a compensation by way of salvage. It is like a case of extraordinary peril, where pilotage would in the opinion of Sir Wm. Scott, be difficult to distinguish from a case of salvage properly so called, and extraordinary exertion and personal danger might in such a case exalt the service into a salvage service. The Joseph, 1 Rob. Adm. Rep. 306. See also the case of The two Friends, 1 Rob. Adm. Rep. 279, where a passenger was allowed large salvage on a rescue.

If a vessel in distress is abandoned at sea by the master and crew, excepting one man, who is left either by accident or de-

When a well-founded claim of salvage has been entered in the Court of Admiralty, the [387] proper course to be pursued by the defendants, in order to save the expense of further proceedings, is to tender, in the first stage of the cause, by *acts of Court*, and not personally and verbally to the claimants, a specific sum for the salvage, accompanied by an offer to pay the costs incurred. The Court will then consider of the sufficiency of the sum tendered, and if it shall be thought sufficient will make the party, who refuses the offer, liable not only to his own costs, but also to the costs of the other side, if it shall appear that the proceedings have been vexatiously pursued (*n*).

In the case of valuable property, and numerous proprietors and salvors, the jurisdiction and proceedings of this Court are admirably adapted to the purposes of justice. But as the delay and expense necessarily incident to the proceedings of a high tribunal, sitting at a distance from the subject in contest, will often be injurious to the parties, the legislature has endeavoured to introduce a more expeditious and less expensive mode of adjustment. For this purpose several provisions were made by a statute passed in the reign of *Queen Anne* (*o*), which were varied and improved by another statute in the reign of *George the Second* (*p*), and I shall

(*n*) The VROUW MARGARETHA, *Jacobs*, 4 Rob. A. R. 103

(*o*) 12 *Anne*, stat. 2 chap. 18.

(*p*) 26 *Geo.* 2. *c.* 19.

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sign, he is discharged from his contract as a mariner of that vessel, and if he contributes to the preservation of the vessel, will be entitled to salvage. Mason & others, Libellants v. Ship Blaireau, 2 Cranch's Rep. 240.

consider the two acts together as forming one body of regulations on this subject. These statutes do not extend to *Scotland*.

[388] 3. In the first place, in all parts of England, *except the Cinqe Ports*, all sheriffs, deputy sheriffs, justices of the peace, and all mayors, bailiffs, and other head officers of corporations and port towns near the sea, coroners, commissioners of the land tax, constables, headboroughs, tithingmen, and officers of the customs or excise, upon application made to any of them, by or on the behalf of the chief officer of any vessel belonging to the King's subjects, *or others*, in danger of being, or actually being, stranded or run on shore, are empowered and required to command the constables of the ports nearest to the coast, to call together as many men as shall be necessary to the assistance and for the preservation of the distressed ship and its cargo; and if any other ship belonging to the King or his subjects, happens to be riding at anchor near the place of distress, the officers of the customs, and constables, or any of them, are empowered and required to demand of the superior officer of such ship, assistance by his boats, and such hands as he can conveniently spare; and if such superior officer refuses or neglects to give such assistance, he forfeits 100*l.* to be recovered by the superior officer of the ship in distress, with costs of suit, in any Court of record (*q*).

4. And to prevent confusion among the persons assembled, either for want of proper orders, or [389] by contradictory orders, they shall conform in the first place, to the orders of the master, or other officers, or owners, or the persons employed by

(*q*) 12 *Anne*, stat. 2. c. 18. s. 1. & 26 *Geo.* 2. c. 19. s. 9.

them ; and for want of their presence and directions, to the orders of the persons authorized to execute these statutes in the following subordination, as they happen to be present; namely, officer of the customs, officer of excise, sheriff or his deputy, justice of the peace, mayor or chief magistrate of a corporation, coroner, commissioner of the land-tax, chief constable, petty constable or other peace officer; under the penalty of 5*l.* for wilful disobedience of such orders, to be levied by warrant of a justice.

5. The high sheriff by the common law, and by the statute (*r*), in case of need, and in the absence of the high sheriff, any justice of the peace may take sufficient power of the county, to repress all unjust violence, and duly to enforce the execution of the statute. And the commander of the ship in distress, or officer of the customs, or constable on board the same, may repel by force persons, who without their consent press on board the ship, and thereby molest them in its preservation (*s*).

6. And for the information of persons interested, who may happen to be absent, the officers of the customs shall, as soon as convenient, cause all persons belonging to the ship, and others, who can give [390] an account thereof, or of the cargo, to be examined upon oath before some justice of the peace, as to the name or description of the ship, the names of the master and owners, and of the owners of the cargo, and of the places of departure and destination, and the occasion of the ship's distress; which examination the justices are to take down in writing, and to deliver a copy thereof, with a copy of the account of the goods, to the officers of the customs, who shall transmit the

(*r*) 26 *Geo.* 2. *c.* 19. *s.* 13. (*s*) 12 *Anne*, stat. 2. c. 18. *s.* 3.

same to the secretary of the Admiralty, who shall publish in the next *London Gazette*, so much thereof as shall be necessary for the information of the persons interested (*t*).

7. And for the encouragement of persons, who give their assistance, and for adjusting their reward, the first statute (*u*) provides, that the officers of the customs (*x*), master of any ship, and all others who shall act or be employed in the preservation of ship or goods, shall within *thirty days* be paid a reasonable reward by the master, mariners, or owners of the ship in distress, or the merchant whose ship or goods shall be saved; and in default, the ship or goods saved shall remain in the custody of the officer of the customs, or his deputy, until the persons employed shall be reasonably
[391] gratified, or good security given for that purpose to their satisfaction; and in case after such salvage, the superior officer, mariners, or owners of the ship saved, or merchant whose goods shall be saved, shall disagree with the officer of the customs, or his deputy, touching the monies deserved by any of the persons employed, the commander of the ship saved, or owner of the goods, or merchant interested therein, and the officer of the customs, or his deputy, may nominate *three* of the neighbouring justices of the peace, who shall thereupon adjust the quantum of gratuities to be paid to the several persons acting or being employed in the salvage; and such adjustments shall be binding to all parties, and shall be recoverable in an action at law, to be brought in any Court of Record by the respective

(*t*) 26 *Geo.* 2. c. 19. *s.* 15.
(*u*) 12 *Anne*, stat. 2. c. 18. s. 2.
(*x*) The words of the act are "the *said* collectors," but *collectors* have not been named before.

persons to whom the same shall be allotted. And in case it shall happen that no person shall appear to make his claim to all or any of the goods that shall be saved, then the chief officer of the customs of the nearest port to the place where the ship was in distress, shall apply to *three* of the nearest justices of the peace, who shall put him or some other responsible person in possession of the goods, such justices of the peace taking an account in writing of the goods, to be signed by such officer of the customs; and if the goods shall not be legally claimed within the space of *twelve months* next ensuing, by the rightful owner thereof, then public sale shall be made thereof, and if perishable goods forthwith to be sold, and after all charges deducted, the residue of the monies arising by such sale, with [392] a fair and just account of the whole, shall be transmitted to the Exchequer, there to remain for the benefit of the rightful owner *when appearing;* who upon affidavit or other proof, made of his right or property thereto, to the satisfaction of one of the Barons of the coif of the Exchequer, shall upon his order receive the same out of the Exchequer.

But this statute not containing a provision for adjustment of the salvage, if the contending parties could not agree in the nomination of justices; nor providing any method of raising money immediately for payment thereof, and being defective in other respects, the subsequent statute (*y*) provides, that the justice of the peace, mayor, bailiff, collector of the customs, or chief constable, who shall be nearest to the place, where any ship or goods shall be stranded, shall forthwith give public

(*y*) 26 *Geo.* 2. c. 19. sect. 6.

notice for a meeting to be held as soon as possible of the sheriff, or his deputy, justices of the peace, chief magistrates of towns corporate, coroners, and commissioners of the land tax, who, or any five or more of them, are required and empowered to examine persons upon oath, adjust the quantum of salvage, and distribute the same among the persons concerned; and the sheriff and other persons before mentioned, attending and acting at the meeting, shall each be paid *four shillings* a [393] day (*z*) for his expenses in such attendance, out of the effects saved.

And if the charges and rewards of salvage directed to be paid by these statutes shall not be paid, or sufficient security given for the same, within *forty days* next after the services performed, the officer of the customs, concerned in the salvage, may borrow and raise as much money as shall be sufficient to pay such charges and rewards, or any part thereof then remaining unpaid, or unsecured, by bill of sale, under his hand and seal, of the ship or cargo saved, or a sufficient part thereof, redeemable nevertheless upon payment of the principal borrowed, and interest at *four per cent.* (*a*).

8. The provisions before mentioned applying only to the case of services performed under the orders of persons authorized to give directions in this respect: it is further directed by the latter statute (*b*), that in

(*z*) This is the sum appointed to be paid to the justices for their attendance at the Quarter Sessions, by a statute made in the 12th year of the reign of *Richard* 2. A. D. 1388, and which still continues, although so utterly inadequate in the present times. But experience shews that the gentlemen of the country are induced to discharge the important office of magistrates by the most honourable motives, and without expecting a remuneration even of their actual expenses.

(*a*) 26 *Geo.* 2. *c* 19. *sect.* 7. There still appears a deficiency in these *statutes*, in not providing for the *immediate* sale of perishable goods, to defray the salvage, which may be sometimes necessary.

(*b*) 26 *Geo.* 2. c. 19. s. 5.

case of any person or persons, not employed by the master, mariners, or owners, or other persons lawfully authorized in the salvage of any ship, [394] or the cargo or provisions thereof, shall, in the absence of persons so employed or authorized, save any ship or goods, and cause the same to be carried for the benefit of the proprietors into port, or to any adjoining custom-house or place of safe custody, immediately giving notice thereof to some justice, magistrate, custom-house or excise officer, or shall discover to any such magistrate or officer, where any such effects are wrongfully bought, sold or concealed, such persons shall be entitled to a reasonable reward, to be paid by the master or owner of the vessel or goods, and to be adjusted in case of disagreement about the quantum, in the same manner as salvage is to be adjusted either by the first or latter statute, as the case shall require.

9. Between the passing of these two statutes a particular provision was made by the legislature for the adjusting of salvage for cables and anchors, from which ships are forced in bad weather within the jurisdiction of the *Cinque ports;* whereby it is ordained, "That "the Lord Warden of the *Cinque ports*, for the time "being, shall nominate and appoint, by an instrument "under his hand and seal, *three* or more substantial "persons in each of the *Cinque Ports* (c), two ancient "towns, and their members, to adjust and de- "termine any difference relating to salvage, if [395] "any such shall arise between the master of any

(c) The Cinque Ports are *Dover, Sandwich, Romney, Hastings*, and *Hythe;* and the two ancient towns, are *Winchelsea* and *Rye*. The jurisdiction extends from *Seaford* along the coast of *Sussex* and *Kent*, the towns on the coast being all members of one or other of the *Cinque Ports*.

"vessel and the person or persons bringing such cable "and anchor ashore, which said persons the said Lord "Warden is hereby authorized and empowered from "time to time to nominate and appoint, and in case "any ship or vessel shall be forced from her cables and "anchors by extremity of weather, and leave the same "in any roads within the jurisdiction of the *Cinque* "*Ports*, and the salvage cannot be adjusted between "the persons concerned, that then the same shall be de- "termined within the space of *twelve hours* by any one "or more of the said persons appointed as aforesaid; "any custom or usage to the contrary in anywise not- "withstanding" (*d*).

10. It has been already noticed that the authority of the magistrates and other persons appointed to execute the two statutes of *Queen Anne* and *George the Second* does not extend to the *Cinque Ports*, and with regard to those ports, it is provided by the same statute of *George the Second*, that the Lord Warden of the *Cinque Ports*, the Lieutenant of *Dover Castle*, the Deputy Warden of the *Cinque Ports*, the Judge official and Commissary of the Court of Admiralty of the *Cinque Ports*, [396] two ancient towns, and the members thereof, and all and every of them, and all and every person appointed by the Lord Warden pursuant to the before mentioned statute of *George the First*, shall be the persons to put in execution these several statutes within the jurisdiction of the *Cinque Ports*, two ancient towns, and members thereof, in the same manner, as any justice of peace, or other persons, are authorized to do in other places (*e*).

(*d*) 3 *Geo.* 1. c. 13. s. 6.

(*e*) 26. *Geo.* 2. *c.* 19. *sect.* 10.

It is generally understood that these wholesome statutes have not taken away the jurisdiction or authority, which previously belonged to any Court of Justice; but I have been thus particular in arranging and detailing their provisions, from a hope that a better knowledge of them may induce the masters of ships in distress to avail themselves of them; instead of applying for assistance to persons who are called ship-agents or ship-brokers, and thereby subjecting themselves, and their employers, to a great part, if not the whole, of the heavy charges from which the legislature has so studiously endeavoured to relieve them (*f*).

The necessity of applying for assistance to the officers or persons named in the statute of *Queen* [397] *Anne*, is rendered more apparent by a very recent determination of the Court of King's Bench, and the facts which gave rise to it. The mate of a vessel in distress, in the absence of the master applied for assistance to a person at *Cowes* in the *Isle of Wight*, who accordingly sent several small vessels and men, and unshipped the cargo, and took it to *Cowes;* in the meantime the master arrived, and approved of what was doing. Some officers of the customs also attended, and took an account of the goods. The proprietors of the

(*f*) The *French Ordinance* so often quoted, contains an apparently excellent set of regulations on this subject, liv. 4. tit. 9. *des naufrages*. All vessels, &c. driven on shore, whether belonging to subjects or foreigners are taken into the King's protection: the officers of the Admiralty are the persons appointed to preserve and take charge of them, and pay the persons, who assist in the salvage, and who are to act under their orders. But there seems to be no proper mode of settling the charges of the officers themselves, no custos custodum; and this defect has probably occasioned the complaints which the commentator informs us, have been often made against their conduct in many places. A year and a day is the period allowed for reclaiming property, after which it is to be sold for the benefit of the crown. But claims have in fact been allowed after that period, as *Valin* informs us.

goods were dissatisfied with the claim made by this person for salvage; and afterwards, but without his concurrence, caused an adjustment to be made by three justices of the peace named by themselves and the collector of the customs at *Cowes*. The question in the cause was, whether this adjustment was binding: and the court held it not to be so; considering the statute of *Queen Anne* as confined to the case of assistance rendered by the officers and persons therein named, and the statute of *George the Second*, as extending the provision to such assistance only as is given *voluntarily* [398] by persons not employed for that purpose (*h*).

11. I proceed in the next place to the consideration of salvage payable upon *recapture*.

I have in a former chapter (*i*) spoken of the subject of capture, and of the alteration of property thereby occasioned. With a view to the subject more immediately under consideration at present, it may be taken as a general proposition, liable only to one exception, which will be noticed hereafter, that the ships or goods of the subjects of this country taken at sea by an enemy, and afterwards retaken at any indefinite period of time, and whether before or after sentence of condemnation, are to be restored to their original proprietors upon payment of salvage to the recaptors.

With regard to the beneficial interest in the goods of an enemy taken at sea, it was anciently established that in the case of capture by ships in the pay of the King,

(*h*) *Baring & others v. Day*, 8 East. 57. The learned judges intimated a hope that the attention of the legislature might be drawn to this subject, and a remedy provided for a case like the present. *Day* had charged for the salvage 1,816*l.* 16*s.* 2*d.* The justices had allowed 714*l.* 19*s.* 4*d.* An arbitrator to whom the case was referred, settled the salvage at 989*l.* 11*s.* 1½*d.* something more than a moiety of *Day's* charges.

(*i*) *Ante*, part 1. ch. 1. sect. 7.

the King should have *one-fourth*, the owners of the ships another *fourth*; and the other moiety be divided among the captors; the admiral taking, if present, the share of *two* men in each vessel; if absent, of [399] *one* only; and in the case of capture by private ships not in the King's pay, the King should claim no part, but the captors take the whole, allowing, however, to the admiral as much as the share of *two* men (*k*). But these proportions were occasionally varied at the King's pleasure; and *Sir Matthew Hale* informs us that in his time the admiral had the *third* of goods taken by private men of war as his fee, but in right of the King (*l*). The entire beneficial interest was first given to the captors whether belonging to the royal navy, or private ships of war, by a statute passed in the reign of *Queen Anne* (*m*). This statute however contains no regulation of salvage or other provision in the case of recapture. During the short war with *Spain* in the reign of *George the first*, no legislative provision was made on the subject of prize. Soon after the declaration of war against *Spain* in the *thirteenth* year of the reign of *George the Second*, and against *France* in the *seventeenth* and *twenty-ninth* years of the same reign, acts of parliament (*n*), were passed on this subject, by each [400] of which the ships or goods of the King's sub-

(*k*) Black book of the Admiralty, 2. 19. 20. *Clerke's Praxis*, p. 163.

(*l*) *Hale's* Treatise in three parts, *part* 3. *chap.* 28. In *Hargrave's* Law Tracts, p. 247. Two of the Ordinances, passed in the time of the usurpation, mention "the *tenths* "of prizes customarily due to the "*Lord High Admiral*," and direct the same to be laid out in medals as a reward for eminent services. *Scobell's Acts*, A. D. 1648. *c.* 12. & 1649. c. 21. The distribution of prizes settled by those Ordinances and by the Ordinances of 1650. c. 28. & 33.

(*m*) 6 *Ann.* c. 13. See *Dr. Robinson's* note in the case of the DER MOHR, *Helmer*, 4 Rob. A. R. 315.

(*n*) 13 *Geo.* 2. *Chap.* 4. Recapture, sect. 18. 17 *Geo.* 2. *chap.* 34. Recapture, sect. 20. 29 *Geo.* 2. *chap.* 34. Recapture, sect. 24

jects taken and retaken, were decreed to be restored to their original owner, and the rate of salvage was fixed at *one-eighth* in the case of recapture by the King's ships; but in the case of recapture by private ships, whether acting with or without commission, the rate was made to vary according to the length of time, during which the vessel might have been in the possession of the enemy; if such possession had not exceeded *twenty-four* hours, the rate was fixed at *one-eighth*, if between *twenty-four* and *forty-eight* at *one-fifth*, if between *forty-eight* and *ninety-six* at *one-third*, if above *ninety-six* at *one-half*. And in all cases, if the vessel recaptured were set forth as a vessel of war, during its possession by the enemy, the rate of salvage was fixed at *one-half*. A provision similar to the last had been made by several ordinances in the time of the usurpation (*o*), which in all other cases settled the salvage at *one-eighth*. The variation of the rate of salvage according to the time of the enemy's possession probably occasioned many disputes, and therefore in the statutes passed in the present reign the rate has been uniformly fixed. At the commencement of hostilities with *America* (*p*), and [401] afterwards with the *French King* (*q*), it was fixed at *one-eighth*, as well in the case of private ships as of those belonging to the royal navy; except in the case of vessels set forth as ships of war, in which case as in the former statutes, it was fixed at *one half*. At the commencement, of the war, in the year 1793, the legislature fixed the rate of salvage at *one-eighth* for the royal navy, and at *one-sixth* for private ships; and in case of recapture by the joint operation of his Majesty's ships, and private ships, authorized the Judge of the

(*o*) *Scobell's Acts*, A. D. 1648. c. 12. 1649. c. 21. and 1650. c. 28. & 33.

(*p*) 16 *Geo.* 3. *c.* 5. *s.* 24.

(*q*) 19 *Geo.* 3. *c.* 67. *s.* 44.

Court to order such salvage as he should deem fit and reasonable; but enacted that recaptured ships, set forth by the enemy as vessels of war, should wholly belong to the recaptors, and not be restored to the original owners (*r*). And by this last statute it is also provided, that if a ship be retaken before she has been carried into an enemy's port, it shall be lawful for her, if the recaptors consent thereto, to prosecute her voyage, and the recaptors need not proceed to adjudication till *six months*, or the return of the ship to the port, from which she sailed: and by consent of the captors the cargo may be unloaded, and disposed of, before adjudication: and if the vessel does not return directly to the port of her departure, or the recaptors have had no opportunity to proceed to adjudication within *six months*, on account of the absence of the vessel, the Court of Admiralty shall, at the instance of the recaptors, decree restitution to the former owners, paying sal- [403] vage, upon such evidence as shall appear reasonable, the expense of such proceedings not to exceed the sum of *fourteen pounds* (*s*). Similar provisions were made at the beginning of the present war; and the same rate of salvage is fixed for his Majesty's hired armed ships, as for the royal navy (*t*).

A convoying ship may be entitled to this salvage, for the recapture of a vessel under its protection taken in that situation, and effectually possessed by the enemy (*u*). (1)

(*r*) 33 *Geo.* 3. *c.* 66. *s.* 42.
(*s*) 33 *Geo.* 3. *c.* 66. *s.* 44.
(*t*) 43 *Geo.* 3. *c.* 160. *sect.* 39 & 41 & 45. *Geo.* 3. *c.* 72. *sect* 7.
(*u*) The WIGHT, *Ford*, 5 Rob. A. R. 215.

(1) No regulation is made by statute in the United States respecting salvage, except in the cases of recapture. The prin-

12. It may be proper to mention in this place the practice of the Court of Admiralty, in the case of the property of the allies of this country, taken at sea by a common enemy, and retaken by the subjects of this country. For this purpose I cannot do better than use the words of the learned Judge, who now presides in that Court. "The maritime law of *England*," says *Sir William Scott*, "having adopted a most liberal rule of "restitution on salvage, with respect to the recaptured "property of its own subjects, gives the benefit of that "rule to its allies, till it appears that they act towards

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ciple of the English Courts of Admiralty (previous to their acts of parliament,) is adopted, of considering the property of goods captured completely, devested only by a sentence of condemnation in a court of competent jurisdiction. 2 Burr. Rep. 694. 1208. The jus postliminii continues until such condemnation, and no longer. Hutson v. Guestier, 4 Cranch. Rep. 293. The act of Congress of the United States, 3. March, 1800, (5 U. S. L. 38. sect. 1.) provides, that if the vessel or goods of any person, resident within or under the protection of the United States, be recaptured after a hostile capture before such vessel or goods shall have been condemned as prize, it shall be restored to the owner on payment of salvage, of one *eighth part* if recaptured by a *public* vessel, and of one *sixth part* if by a *private* vessel of the United States; but if the recaptured vessel be armed, either before or after capture, then the salvage shall be one *half part*.

If the recaptured vessel or goods belong to the United States, the salvage shall be one sixth part, if recaptured by a private vessel, and one *twelfth* part, if by a public vessel: and if the recaptured vessel be a public armed vessel, then one moiety if recaptured by a private vessel, and one fourth part if by a public vessel. Same act, sect. 2.

"*British* property on a less liberal principle; in such a "case it adopts their rule; and treats them "according to their own measure of justice" (*x*). [403] In conformity to this rule the *San Jago* was not restored to the King of *Spain*, because retaken from his then enemy the *French* under circumstances, in which the *Spanish* Courts had condemned *British* property retaken by the *Spaniards:* and shortly afterwards two *Portuguese* ships were for the same reason condemned; and several others at the same time restored (*y*), because in the interval between the different captures, an Ordinance of the Court of *Portugal* had altered the rule of restitution in that country; and they were restored upon payment of the rate of salvage established in *Portugal; viz. one-eighth* to King's ships, and *one-fifth* to privateers. Of this rule of *British* jurisprudence, whatever attempts may be made to shake it from motives of public policy or private interest, reason must now declare, and posterity will hereafter confess, that it is founded on the immoveable basis of reciprocal justice (1).

(*x*) In the case of the SANTA CRUZ, 1 Rob. A. R. 63. The whole is a most finished model of judicial eloquence.

(*y*) Same case.

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(1) The act of Congress above cited (sect. 3.) adopts the same liberal rules in its provisions on this subject in the fullest extent. See in the Appendix this act at large.

In cases of recapture, by the same act, the salvage, if given to a public armed vessel, is to be distributed as prize money; if given to a private armed vessel then according to the agreement between the parties concerned; if there be any, if not, then as the court having jurisdiction thereof shall appoint.

13. If the property of a nation not engaged in hostility with the enemies of this country, happen to be taken as prize by them, and retaken out of their hands by his Majesty's subjects; the probability of its condemnation in the Courts of the country of the captors is to be considered: and unless there appear to be ground,

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In other cases of salvage the manner in which it shall be distributed is discretionary.

The leading cases on this head in England *are* in case of derelict, The Aquila, 1 Rob. Adm. Rep. 37.;—of recapture by unauthorized vessels, The San Bernardo, 1 Rob. Adm. Rep. 178. The Haase, 1 Rob. Adm. Rep. 286. The Amor Parentum, 1 Rob. Adm. Rep. 303.; of rescue, The Two Friends, 1 Rob. Adm. Rep. 271.; of services to vessels in distress, The William Beckford, 3 Rob. Adm. Rep. 355. The Franklin, 4 Rob. Adm. Rep. 147. The Vrow Margaretha, 4 Rob. Adm. Rep. 103. In the United States in case of derelict, The Mary Ford, 3 Dallas' Rep. 188.; and of service to vessel in distress, Mason & others, Libellants, v. Ship Blaireau, 2 Cranch. Rep. 240. On recapture of American Ships, Bas. v. Tingey, 4 Dall. Rep. 37.; of neutral ships, Talbot v. Ship Amelia, 1 Cranch. Rep. 1. See also 2 Dall. Rep. 1. 1 Peters. Adm. Rep. 31. 70. 87. 278. 284. 424.

If apprentices are salvors, their masters are not entitled to their share of the salvage, but it shall be paid to the apprentices themselves. The right of the master to the earnings of his apprentice extends only to those in the ordinary way of his business, and not to those which arise from extraordinary services, which have no connection with his business. The Ship Blaireau, 2 Cranch. Rep. 240. The same point seems decided incidentally in The Beaver, 3 Rob. Adm. Rep. 292.

on which it may be supposed that it would have been condemned in those Courts, it is to be re- [404] stored *without the payment of any salvage.* In the late war, the conduct of the cruizers and prize courts of France having given reason to apprehend that neutral property arrested by the former on the high seas, would in almost all cases be condemned by the latter, salvage was usually allowed to recaptors of neutral property out of the hands of the *French* by our Court of Admiralty, and such allowance was not thought unreasonable by the neutral merchants: but this was treated as an exception to the general rule, founded on particular circumstances (*z*).

(*z*) The CARLOTTA, *Pasquel*, 5 Rob. A. R. 54. The ELEONORA CATHARINA, *Kreagh*, 4 Rob. A. R. 156. The HUNTRESS, *Stinson*, 6 Rob. A. R. 104.

But while the policy of the law holds forth a liberal reward to all persons who fairly exert themselves to succour vessels in distress, it studiously denies it to those who on occasions of that nature are guilty of gross misconduct or fraud, and therefore if one of the salvors embezzle part of the goods saved, he forfeits his right to salvage. The Ship Blaireau, 2 Cranch. Rep. 240.

See also as to this general doctrine, The Huntress, 6 Rob. Adm. Rep. 104. The Sansom, id. 410., and Talbot v. Ship Amelia, 1 Cranch. Rep. 1. S. C. 4 Dall. Rep. 34.

CHAPTER THE ELEVENTH.

OF THE DISSOLUTION OF CONTRACTS FOR THE CARRIAGE OF GOODS IN MERCHANT SHIPS.

1. HAVING thus considered the several species of contract made for the carriage of goods in merchant ships, and the various duties arising therefrom, I proceed in the last place to the examination of the modes, by which contracts of this nature may be dissolved.

And these are, either the voluntary act of the [405] contracting parties, or some extrinsic matter happening after the making of the contract and before its completion.

2. It is a general rule that whatever derives its force and validity from the consent of parties, may by the mutual consent of the same parties be rendered null and invalid. There is indeed a technical rule of the law of *England*, which requires the discharge of a person from a contract to be made by an instrument of as high a nature as the original instrument of contract: and this rule is applicable to the contract of affreightment by charter-party under seal; but in case of a discharge by mutual consent not expressed in this formal manner, the rule would at the utmost have no other effect than to render it necessary for the party to apply to a Court of Equity. In all such cases however prudence requires that the deed should be cancelled and delivered up.

But a merchant, who has laden goods, cannot insist upon having them relanded, and delivered to him

out paying the freight, that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him (*a*). Indeed a master who has signed bills of lading cannot with prudence deliver back the goods without having all the parts of the bill of lading delivered up to him, for if any one part has been transmitted [406] to a third person, such third person may have acquired an interest in the goods.

3. Another general rule of law furnishes a dissolution of these contracts by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the government of the country, the agreement is absolutely dissolved. If therefore, before the commencement of a voyage, war or hostilities should take place between the state to which the ship or cargo belongs, and that to which they were destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end (*b*), the merchant must unlade his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage, although a different rule is laid down in this case by the *French* Ordinance (*c*), as I have before observed (1). But if war or hostilities

(*a*) 2 Eq. Ca. Ab. p. 98. *Anon.* (*c*) Liv 3. tit. 3. *Fret.* art. 15.
(*b*) *French Ordinance*, liv. 3. tit. 1. des charte-parties, art. 7. See before, part 3. ch. 7. sect. 5.

(1) If the port to which the ship is by the charter-party bound to proceed, be blockaded, this produces a dissolution of

break out between the place, to which the ship or cargo belongs, and any other nation, to which they are not destined; although the performance of the contract is thereby rendered more hazardous, yet is not the [407] contract itself dissolved, and each of the parties must submit to the extraordinary peril, unless they mutually agree to abandon the adventure.

So, if the government of the country, to which the ship and cargo belong, should prohibit the exportation of the particular commodities, that compose the cargo, or by the terms of the contract are destined to compose it, (as is sometimes done by all states with regard to provisions in a time of scarcity,) in this case also it seems that the law of the country would give no damages to the owner against the merchant, who had been thus compelled by the law of the same country to abandon his engagement. On the other hand, if a merchant hire a ship to go to a foreign port, and covenant to furnish a lading there, a prohibition by the government of that country to export the intended articles, neither dissolves the contract, nor absolutely excuses a non-performance of it (*d*); for the laws of one nation do not give effect to the positive institutions of another incon-

(*d*) Said by the court to have been so decided in Chancery, 2 Vern. 212. And see *Dig.* 19. 2. 61. 1. Ordin. of *Rotterdam*, art. 130, 131, 132. 2 *Mag.* 102. and *Cleirac*, note 4. on the 19th article of the laws of *Oleron*. And ruled in the case of *Blight & others v. Page*, Guildhall Sit. after M. T. 1801, before *Lord Kenyon*, Ch. J. cited 3 Bos. & Pull. 295, *note* (a).

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the charter-party. This was so held on a charter-party between neutral citizens in Scott v. Libby, 2 John. Rep. 336.; and on a charter-party between a neutral and a belligerent by Sir William Scott in The Tutela, 6 Rob. Adm. Rep. 177.

sistent with its own; and the different interests of nations sometimes render an act meritorious in one, which is prohibited by another in alliance with it, if the act be not contrary to the general law of nations, or to existing treaties; and the common exception of the restraint of princes and rulers applies only to the [408] case of the master (*e*). But in such a case it would be the duty of the master upon his arrival at the port of lading to obtain another cargo, if possible, from other persons, and not sullenly hoist sail and depart, in order to charge the merchant with the whole freight. And if upon the ship's arrival he is informed that the merchant is unable to furnish the lading, he cannot, by waiting the time appointed in the charter-party, charge the merchant with the demurrage (*f*).

4. But although contracts of this nature are dissolved by the breaking out of war or hostilities in the manner before mentioned, of which no person can foresee the termination: yet they are not dissolved by an embargo, or temporary restraint of their performance imposed by the government of the country, in whose ports the vessel may happen to be, as a measure of political caution in time of war, or upon the expectation of it, either in the lading port, or in a place, at which the ship may have touched in the course of her voyage (*g*). This subject has lately received a judicial determination in the law of *England*. The case (*h*) was as follows: *Hadley*, the plaintiff, brought an action against [409] *Clarke & others*, owners of the ship *Pomona*, for

(*e*) *Blight & others v. Page*. And see also as to this point *Touteng & another v. Hubbard*, 3 Bos. & Pull. 298.

(*f*) *Blight & others v. Page*.

(*g*) *French Ordinance*, liv. 3. tit. 1. des charte-parties, art. 8. and see liv. 3. tit. 3. *fret*. art. 16. *Pothier*, charte-partie, num. 100.

(*h*) *Hadley v. Clarke*, 8 Ter. Rep. K. B. 259.

not carrying to *Leghorn* goods put on board the *Pomona* at *Liverpool* to be conveyed to *Leghorn*, the danger of the seas only excepted. The plaintiff had paid 297*l.* 18*s.* for insurance of the goods for the voyage. The ship sailed from *Liverpool*, and in pursuance of permission given for that purpose put into *Falmouth* on the 30th of *June* 1796, to wait for convoy. While she waited there for that purpose, an embargo was, by order of the King in council, dated 27th *July* 1796, laid on all ships bound to *Leghorn*, being one of the ports in the territories of the Grand Duke of *Tuscany*, then in the possession of the *French*. This embargo was directed to continue until further order of the board of Privy Council. On the 23d of *August* following another order of Council issued, allowing vessels in the situation of the *Pomona* to return to their ports of lading, and land and warehouse their cargoes there nuder certain regulations. In the month of *August* 1798, and not before, the *Pomona* left *Falmouth* without the consent of the plaintiff and returned to *Liverpool*, where after some dispute the plaintiff received the goods without prejudice to the question, whether under the circumstances the defendants were excused for the non-performance of their contract. On the 24th *October* 1798, the embargo was taken off. At the trial of the cause the plaintiff obtained the verdict of a jury for the amount of the charges of insurance. The right of the plaintiff to recover was afterwards solemnly discussed in the
[410] Court of King's Bench; and the Court was of opinion that the embargo did not dissolve the contract, being only a temporary restraint, and that the plaintiff had a right to recover. Before the commencement of the transaction between the parties, all inter-

course with countries under the government of the *French*, during the then existence of hostilities between *France* and this country, had been prohibited by act of parliament (*i*); but this prohibition was also held to be only temporary with respect to *Leghorn*, and consequently not to alter the case.

In the case of an embargo, the *French* Ordinance expressly authorizes the merchant to unlade the goods at his own expense, if he thinks fit, upon condition to relade them or indemnify the master (*k*); and *Valin* (*l*) and *Pothier* (*m*) declare it to be their opinion, that if the goods are of such a sort, that they will not keep during the period of the embargo, and cannot at its expiration be readily replaced by others of the like kind, the embargo will put an end to the contract. In such a case, whatever the rule of law may be, the interest of all parties will in general induce them to annul the contract upon reasonable terms.

4. *b.* But in the case of an embargo imposed by the government of the country, of which the merchant is a subject, *in the nature of reprisals and* [411] *partial hostility* against the country, to which the ship belongs, the merchant may put an end to the contract, if the object of the voyage is likely to be defeated by the delay. Thus in the case of a *Swedish* ship, chartered by a *British* merchant to go from *London* to *St. Michael's* for a cargo of fruit, which having sailed on the voyage was driven back by contrary winds, and forced into *Ramsgate* harbour, and there stopped on the 15th of *January*, 1801, by the embargo imposed by the

(*i*) 33 *Geo.* 3. c. 27. sect. 3.
(*k*) Liv. 3. tit. 1. *Charte-parties* art. 9.
(*l*) Tom. i. p. 628.
(*m*) *Charte-Partie*, num. 102.

British government on all *Swedish* vessels; upon which the merchant applied to the captain to give back his letters of advice, who declined to do so, and who soon after the embargo was taken off, which happened in the following *June*, offered to proceed on the voyage, but was directed by the merchant not to do so, because the season for shipping fruit was then passed; the Court of Common Pleas held that the master could not maintain an action against the merchant for the non-performance of the contract (*n*). For otherwise a *British* subject would sustain the evils that the government of his country intended to inflict on *foreigners;* which is contrary to the principle now established in the law of insurance, *viz.* that the insurer is not answerable for a loss happening to *an enemy* by *British* capture in a course of hostilities, whether existing at the time of the insurance, or taking place afterwards (*o*). In the case of [412] another *Swedish* vessel stopped under the same embargo, with a *British* cargo of fish on board, the cargo was taken out and restored; and upon the restoration of the ship the learned Judge of the Court of Admiralty held the merchant not to be liable to the freight, as I have mentioned before (*p*).

(*n*) *Teutenz & another v. Hubbard*, 3 Bos. & Pull. 291.

(*o*) *Furtado v. Rodgers*, 3 Bos. & Pull. 191. And *Kellner v. LeMesurier*, *Gamba v. Le Mesurier*, and *Brandon v. Curling*, all three decided in the Court of King's Bench in Mich. Term. 1803, and reported, 4 East. 396, 407, 410.

(*p*) The ISABELLA JACOBINA, *Sovergren*, 4 Rob. A. R. 77. cited before, chap. 7. of this part, sect. 15. *b*.

PART THE FOURTH.

OF THE WAGES OF MERCHANT SEAMEN.

CHAPTER THE FIRST.

OF THE HIRING OF SEAMEN.

SEAMEN employed in merchant ships are usually hired at a certain sum, either by the month, or for the voyage. In the former case the amount of the payment, that may be earned by them, depends upon the length of the voyage; in the latter it is fixed invariably without any regard to the duration of the voyage. In the fishing trade, particularly the whale-fishery, and in private ships of war, the seamen usually serve under an engagement to receive a certain portion of the profits of the adventure. Such an engagement is rather in the nature of a partnership than of a contract of hiring and service, and the objects of it do not properly fall under my consideration (1). An engagement to receive a

(1) But in an action brought against the master by a seaman in the whale-fishery, who was to receive a certain part of the profits of the voyage in lieu of wages, after the cargo was sold, Lord Alvanley held that he was entitled to recover the amount of his share; that the share was to be considered, when liquidated by sale, as in the nature of wages; and that mariners in

certain part of the freight, to be earned by a merchant ship, which seems formerly to have been not unfrequent, is at present seldom, if ever made.

This last part therefore of the present treatise [414] will be employed in the consideration of contracts made for the employment of seamen by the month or for the voyage; of the earning and payment of wages in pursuance of such contracts: of the loss and forfeiture of wages; and of the modes of enforcing payment by the aid of Courts of Justice. Each of these topics will form the subject of a distinct chapter.

And FIRST, as to the *hiring* of seamen.

1. In order to prevent the mischiefs, that frequently arose from the want of proper proof of the precise terms, upon which seamen engaged to perform their service in merchant ships, it is enacted by a statute made in the early part of the reign of *King George the Second*, "That it shall not be lawful for any master or com-"mander of any ship or vessel, bound to parts beyond "the seas, to carry any seaman or mariner, except his "apprentice or apprentices, to sea from any port or "place, where he or they were entered or shipt, to pro-"ceed on any voyage to parts beyond the sea, without "first coming to an agreement or contract with such

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this employ were to be considered, not as partners, but as entitled to wages to the extent of their proportion in the produce of the voyage. Wilkinson v. Frazier, 4 Esp. N. P. C. 182. And the same opinion seems to have been adopted by Sir William Scott in The Frederic, 5 Rob. Adm. Rep. 8. See also the act of Congress for the regulation of the Fisheries, passed 16. February, 1792, (2 U. S. L. 15.) and particularly sect. 4. as to the remedy of fishermen.

"seamen or mariners for their wages; which agree-
"ment or agreements shall be made in writing, declar-
"ing what wages each seamen or mariner is to have
"respectively, during the whole voyage, or for so long
"time as he or they shall ship themselves for:
"and also to express in the said agreement or [415]
"contract the voyage for which such seamen or
"mariner was shipt to perform the same;" under a penalty of 5*l.* for each mariner carried to sea without such agreement, to be forfeited by the master to the use of Greenwich Hospital (*a*) This agreement is to be signed by each mariner within three days after he shall have entered himself on board the ship; and is, when signed, conclusive and binding upon all parties (*b*). A subsequent statute has extended these provisions to all his Majesty's colonies in *America* (*c*). (1) The statute

(*a*) 2 *Geo.* 2. *c.* 36. *sect.* 1. Made perpetual by 2 *Geo.* 3. *c.* 31. A similar agreement is required by an act of Congress of the United States of *America*, 1790. *c.* 29. *sect.* 1.
(*b*) 2 *Geo.* 2. *c.* 36. *sect.* 2.
(*c*) 2 *Geo.* 3. *c.* 31. *sect.* 2.

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(1) The act of Congress for the regulation of seamen in the merchants' service, provides that "every master or commander "of any ship or vessel, bound *from a port in the United States to* "*any foreign port*, or any ship or vessel of the burthen of fifty "tons or upwards, bound from a port in one State to a port in "any other than an adjoining state, shall, before he proceed on "such voyage, make an agreement in writing or in print, with "every seaman or mariner on board such ship or vessel, (ex-"cept such as shall be apprentice or servant to himself or "owners) declaring *the voyage or voyages, term or terms of time*, "for which such seaman or mariner shall be shipped," under a penalty of twenty dollars for every such mariner, and a liability to pay the highest wages given at the port of departure; and

requires the agreement to be signed only, and does not require it to be sealed. And at the trial of an action *upon the case* brought by a mariner for his wages against the master, (a form not applicable by the law of

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such mariner shall not be subject to the penalties of the same act. Act, 20. July, 1790, ch. 29. (1 U. S. L. 134.) This section does not apply to a voyage commencing *from* a foreign port *to* the United States. Gardner v. Ship Jersey, 1 Peters. Adm. Rep. 223. Where there is no written agreement Judge Peters has held, that a parole agreement for less than the *highest price* might be proved, and superseded the provision of the act. See Jameson v. The Regulus, 1 Peters, Adm. Rep. 212. note. But though exempted from the penalties of the act, where there is no written agreement, seamen are still liable to the forfeitures of the marine law. id. ibid.

The act of Congress requires that the agreement should specify the voyage or term of time for which the mariner is hired. The term voyage is a technical phrase, and always imports a definite commencement and end. Nomen loci ubi navis oneratur, et nomen loci, quo navis tendit. Where the shipping articles were for a voyage from Baltimore to Curracoa and *elsewhere*, Judge *Winchester* held that these words, and elsewhere, did not authorize a voyage from Baltimore to St. Domingo. The act of Congress would be a nullity if words of this nature should be construed to be a sufficient description of the voyage. The terminus a quo and the terminus ad quem must be specified, or in case of a general adventure the term of service must be specified. The word "elsewhere," must therefore be construed in this case as void for uncertainty, or as subordinate to the principal voyage stated, and in this latter view as authorizing the ship in the course of the voyage, to pursue such course as might be necessary to accomplish the principal voyage, which is no more than the law would imply. It is not necessary to

England to a contract *by deed*,) at which it appeared that seals were affixed to the names of the plaintiff and other mariners, at the foot of the articles, which in other respects were in the usual form ; the learned Judge, who tried the cause, held the form of action proper notwithstanding the seal (*d*). A seal alone does not constitute a deed in the technical language of our law ; *delivery* as a deed is essential to this purpose ; but it did not appear that this instrument either had been, or was intended to be, so delivered (2).

(*d*) *Clement v. Gunhouse*, at Guildhall, before *Chambre* J. 5 *Espinasse's*, N. P. C. 83.

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specify the ports by name ; but there must be some equivalent designation, such as to a port or ports, island or islands in the West-Indies, or to the Mediterranean, or the like. The legal termination of such a voyage is ascertained by the most solemn decisions and able opinions. 1 Law. Journal Amer. 207. See also Hoyt v. Wildfire, 3 John. Rep. 518. See also 2 Bos. & Pull. 116. as to description of a voyage in a declaration.

(2) On the contrary, the conclusion of the instrument was " in witness whereof the parties have *set their hands*," from which it was to be inferred that the intention of the parties was not to contract by deed.

And if the parties contract by deed, but the deed is executed by one party only, an action of assumpsit may be maintained on it against the other party. Wherefore where a mariner seals and signs the ship's articles, but they are not sealed by the master, assumpsit lies against him for the wages of the mariner. The binding by deed ought to be mutual to make it necessary for the plaintiff to declare in covenant. Sutherland v. Lishnan, 3 Esp. N. P. C. 42. These distinctions are technical, but important in their consequences.

By another statute a similar agreement in [416] writing is required to be signed by the master and mariners of vessels of the burthen of one hundred tons or upwards, employed in the *coasting trade* from any port or place in *Great Britain*, to any other port or place in *Great Britain*, and going *to open sea* (e).

2. With regard to ships trading to the *West-Indies*. It is by a late statute enacted, that after the *first* day of *July* 1797, every seaman, who shall desert at any time during the voyage either out or home from any *British* merchant ship trading to or from his Majesty's colonies and plantations in the *West-Indies*, shall, over and above all punishments, penalties, and forfeitures, to which he is now by law subject, forfeit all the wages he may have agreed for with, or be entitled to during the voyage from, the master or owner of the ship, on board of

(e) 31 *Geo.* 3. *c.* 39. *sect.* 1. 2. & 10. The agreement under this act need not be stampt, sect. 10.

The master is also liable for the mariner's wages, although he has been shipped by the owner. Farrell v. M'Clea, 1 Dall. Rep. 392.

And if in consequence of being sick the mariner is left in a foreign port, he is entitled to wages up to the time of the successful termination of the voyage. Chandler v. Grieves, 2 H. Bl. 606. n.

And the law seems to be the same in the United States. Natterstrom v. Ship Hazard, Dist. Court, Mass. 1809, cited post, 427. But where a mariner, after recovery from sickness, might have rejoined the ship, which was on a circuitous voyage, Judge Peters decreed that he should be entitled to wages up to the ime when he might have rejoined the ship, and no further. Williams v. Brig Hope, 1 Peters. Adm. Rep. 138.

which he shall enter immediately after such desertion (*f*).

The articles of agreement to be entered into between the master, seamen, and mariners of the ships, to which this statute relates, are thereby required to be to the purport and effect of the form annexed by way of schedule to the statute. This form is substantially the same as that, which previously was, and still continues to be, in common use for all ships employ- [417] ed in foreign trade; and as I shall frequently have occasion to refer to it, it will be printed in the *Appendix* (*g*).

3. And by the same statute it is enacted, "That all "and every master or commander of *any British* mer- "chant ship, who shall from and after the first day of "*July*, 1797, hire or engage to serve on board his ship "or vessel, any seaman, mariner, or other person, who "shall, to the knowledge of such master, have deserted "from any other ship or vessel, shall forfeit and pay the "sum of *one hundred* pounds (*h*)." As this clause is expressed in general terms, and is not limited to ships engaged in the *West-India* trade, either by direct reference to the preamble of the statute, or otherwise; it may probably be held to extend to all cases, and not to be confined to the masters of ships engaged in that trade.*

4. By the same statute it is also enacted, "That no

(*f*) 37 *Geo.* 3. *c.* 73. *sect.* 1. This is a public act. The regulations made on this subject in *France* are mentioned in *Valin's Com.* on the *French Ordinance*, tom. 1. p. 535.

(*g*) See *Appendix*, No. V.

(*h*) 37 *Geo.* 3. *c.* 73. *sect.* 2. The penalties imposed by this act, are to be distributed one-third to Greenwich Hospital, one-third to the Seamen's Hospital or fund at the ship's port, and one-third to the informer; and may be recovered by action in the Courts at *Westminster*; or such as do not exceed 20*l.*, before a Justice of the Peace.

* No similar clause in act of Congress.

" master or commander of any merchant ship or vessel,
" which shall, from and after the first day of *July* 1797,
" sail or proceed from any port or place in *Great*
[418] " *Britain*, shall hire or engage, or cause or pro-
" cure to be hired or engaged, any seaman, mar-
" iner, or other person, at any port or place within his
" Majesty's colonies or plantations in the *West-Indies*,
" to serve on board any such merchant ship or vessel,
" at or for greater or *more wages or hire* for such ser-
" vice, than according to the rate of *double monthly*
" *wages* contracted for with the seamen, mariners, and
" other persons, hired or engaged to serve on board
" such ship or vessel, at the time of her then last depar-
" ture from *Great Britain*, being in the same degree
" and station, in which such seaman, mariner, or other
" person, shall be so hired or engaged at any such port
" or place as aforesaid; unless the governor, chief mag-
" istrate, collector, or comptroller, of such port or place
" in the said colonies or plantations, shall think that
" greater or more wages or hire, than double the month-
" ly wages aforesaid, should or ought to be given to
" such seaman, mariner, or other person as aforesaid,
" and do and shall accordingly authorize or direct the
" same to be given by writing under his hand; that
" then and in such case the master or commander of
" such ship or vessel shall and may be at liberty to pay,
" and the seaman, mariner, or other person on board
" such ship or vessel to receive *such* greater or higher
" wages as such governor, chief magistrate, collector,
" or comptroller, shall *direct* as aforesaid;" and all con-
tracts and securities entered into or given, contrary to
the intent and meaning of this act, are made null and

void to all intents and purposes; and the master or other person, who shall enter into, or [419] give, or procure to be made, entered into, or given, any such contract or security, or who shall hire, or cause to be hired, any seaman or other person to enter on board, contrary to the intent and meaning of this act, or who shall pay or cause to be paid, any greater hire, wages, or other gratuity or advantage whatsoever, than is allowed or directed by this act, shall for every such offence forfeit *one hundred* pounds (*i*).

It is provided nevertheless, "That nothing in this "act shall extend, or be construed to extend, to any "contract or agreement, which shall or may be made "with any seaman, mariner, or other person, hired or "engaged to serve on board any merchant ship or ves- "sel at any port or place within his Majesty's colonies "or plantations in the *West-Indies*, who shall at the "time of such hiring or engagement produce and deliv- "er to the master and commander of such ship or ves- "sel a certificate under the hand of the master or com- "mander of the ship or vessel, on board of which such "seaman, mariner, or other person, had then last served, "signed in the presence of one or more witness or "witnesses, stating their usual place or places of abode, "thereby declaring or certifying that such seaman, "mariner, or other person, had been duly discharged "from the ship or vessel, on board of which he had so "last served; and which certificate the said "master or commander shall grant within three [420] "days next after application made to him by "such seaman, mariner, or other person, before a "witness, or in default thereof shall forfeit and pay the

(*i*) 37 *Geo.* 3. *c.* 73. *sect.* 3.

"sum of *twenty pounds*, to be levied, recovered, and "applied in manner herein-before directed; nor to any "contract or agreement to be made with any seaman, "mariner, or other person, hired or engaged to serve "on board any merchant ship or vessel, which through "necessity, or on account of very hazardous service, or "extraordinary duty, require such contract or agreement "to be made, or more wages or hire given, and of "which necessity, service, or extraordinary duty, proof "shall be made on oath before the chief magistrate or "principal officer of any port or place, or before any "Justice or Justices of the Peace of the said colonies "or plantations; and provided also that such seaman, "mariner, or other person, so hired or engaged to serve "on board any ship or vessel so requiring such service, "shall not have deserted from the ship or vessel on "board of which he had then last served; and provi-"ded also, that no greater wages or hire shall be given "by any master or commander, or taken or received "by any seaman, mariner, or other person, as aforesaid, "except in cases of such necessity, very hazardous "service, or extraordinary duty, as aforesaid, than af-"ter the rate of double the monthly wages, or the "wages to be settled or directed by any gover-
[421] "nor, chief magistrate, collector, or comptroller, "as herein-before directed, to be paid or receiv-"ed as aforesaid" (*k*).

It is difficult to collect the real intention of the legislature from this long and confused proviso. If, as at first sight appears, it was intended to allow the master to give more than double wages without the authority of a magistrate in *two* cases; namely; *first*, to mariners

(*k*) 37 *Geo.* 3. *c.* 73. *s.* 10.

producing a certificate of discharge from their last ship; and, *secondly*, in the case of necessity, hazardous service, or extraordinary duty, proved upon oath, to mariners, who have not deserted from their last ship; then the *last* part of the clause will be ineffectual. If, on the other hand, it was intended to allow this power to the master only in the case of necessity, &c. so proved, and to mariners who have not deserted, then the *first* part of the clause will be ineffectual.

5. Soon after the passing of this statute, it was decided, that a licence given by a magistrate in the *West-Indies*, to the master of a ship, "*to procure men on such "terms, as he could, to navigate the ship home,*" was not a compliance with the regulation prescribed, and that a mariner could not maintain an action on a promise made in pursuance of such licence to pay wages exceeding in amount double the wages agreed to be given to a person in the like situation on the outward voyage: for that the statute required the magis- [422] trate to exercise his own discretion as to the rate of wages to be paid, and to specify the same in the licence (*l*).

6. A form of articles of agreement between the master, officers, and mariners of *British* ships employed in carrying slaves from the coast of *Africa*, is annexed to the statutes made for regulating the manner of carrying slaves in such ships, which contains several regulations applicable to that particular employment, and is the only form allowed to be used for ships in that employment.

These legislative provisions respecting seamen, extend to every officer of the ship, except the master. His contract can only be made with the owners, and is not required to be in writing.

(*l*) *Rodgers v. Lacy*, 2 Bos. & Pull. 57.

7. The statutes do not render a verbal agreement for wages absolutely void; but impose a penalty on the master, if a written agreement is not made. When a written agreement is made, it becomes the only evidence of the contract between the parties; and a mariner cannot recover any thing agreed to be given in reward for his service, which is not specified in the articles: this has been decided with respect to a promise to pay to the mate of a ship employed in the slave trade, the average price of a slave at the place [423] of the ship's destination (*m*); and also with respect to a promise to pay to a sail-maker, serving in a ship belonging to the *East-India* Company, a monthly sum beyond the wages mentioned in the ship's articles, which had been signed by him as sail-maker (*n*).

8. A seaman who has engaged to serve on board a ship, is bound to exert himself to the utmost in the service of the ship; and therefore a promise made by the master when a ship was in distress, to pay an extra sum to a mariner as an inducement to extraordinary exertion on his part, was esteemed to be wholly void (*o*). (1)

(*m*) *White v. Wilson*, 2 Bos. & Pull. 116. and the ISABELLA, *Brand*; 2 Rob. A. R. 241.

(*n*) *Elsworth & Wife v. Woolmore*, Guildhall, Sit. Dec. 1803, before *Lord Alvanley*, Ch. J. There is a note of this case in *Mr. Espinasse's* N. P. C. vol. 5. p. 84.

(*o*) *Harris v. Watson*, Peake's N. P. Cases, 72.

(1) No wages can be recovered where the hiring has been for an illegal voyage, or in contravention of the provisions of a statute. No man can make claim to the wages of iniquity. The law will not countenance a contract ex turpi causa. Therefore in a case where a contract had been made in a slave voyage contrary to the statute, Sir William Scott repudiated the claim for wages with manifest indignation. The Vanguard, 6 Rob. Adm. Rep. 207.

CHAPTER THE SECOND.

OF THE EARNING AND PAYMENT OF WAGES.

I PROPOSE in the present chapter to consider, FIRST, the cases in which the *whole* wages agreed to be given to seamen are to be paid; SECONDLY, the cases in which a *part* only is to be paid; and, LASTLY, the *time* at which the payment is to be made. [424] All that is said in this and the following chapter respecting seamen, is to be understood of all the officers in the ship, except the master, and of him also, if the subject is not inapplicable to his situation and character.

1. FIRST, it is obvious that a seaman, who has faithfully performed his service on board a ship during the whole period of the intended voyage, is entitled to receive the whole of the stipulated reward, if no disaster has rendered his service useless or unproductive to his employer. And as a seaman is exposed to the hazard of losing the reward of his faithful service during a considerable period in certain cases, so on the other hand the law gives him his whole wages, even when he has been unable to render his service, if his inability has proceeded from any hurt received in the performance of his duty, or from natural sickness happening to him in the course of the voyage (*a*). And if a master in viola-

(*a*) Laws of *Oleron*, art. 6 & 7. of *Wisbuy*, art. 19. of the *Hanse-Towns*, art. 39 & 45. same of the year 1614, tit. 14. art. 1. *French Ordinance*, liv. 3. tit. 4. *Des Loyers des Matelots*, art. 11. *Chandler v. Grieves*, 2 Hen. Blac. 606. *note* (*a*); and by *Lord Mansfield* in the case of *Paul v. Eden*, in the King's Bench. E. T. 25 *Geo.* 3.

tion of his contract discharges a seaman from the ship during a voyage, the seaman will be entitled to his full wages up to the prosperous determination of the voyage deducting, if the case require it, such sum as [425] he may in the meantime have earned in another vessel (*b*). (1) The *French* Ordinance

(*b*) *Robinet v. The ship* EXETER, 2. Rob. A. R. 261. The BEAVER, *Grierson.* 3 Rob. A. R. 92. *Roccus* not. 43. Old *Hanseatic* Ordinance, art. 42. *Hanseatic* Ordinance of 1614. tit. 3. art. 7.

(1) The same point is established in Mahoon v. The Gloucester, 2 Peters. Adm. Rep. 403., in Rice v. Polly and Kitty, id. 420., and in Weiberg v. The St. Oloff, id. 428. Hulle v. Heightman, 2 East. Rep. 145. Keane v. The Gloucester, 2 Dall. Rep. 36. Hoyt. v. Wildfire, 3 John. Rep. 518.

But the residue of the crew cannot claim more wages, although by the dismission of such mariner, the risk and labor becomes proportionally greater. Keane v. The Gloucester, 2 Dall. 36.

There is a technical rule applicable to the courts of *common law*, which requires attention. I allude to the manner of stating the demand of the mariner who is dismissed. It seems that if wrongfully dismissed, he cannot recover his full wages in an action, declaring generally for labor and services, but should in an action against the master specially state the injury whereby he was prevented from earning his full wages. See Hulle v. Heightman, 2 East. Rep. 145. And if by the ship's articles, the mariner is not to demand his wages *until the end of the voyage*, such form of action is indispensible, upon a wrongful dismission, as this act of the master is not considered as a recision of the contract. id. ibid. However in the case of Sigard v. Roberts, 3 Esp. N. P. C. 71., where the wages were not payable *until the voyage was ended*, Lord Eldon held, that the master having dismissed the mariner, he was entitled to recover his wages in the

adds, that in such cases the master shall not charge the owners with the payment (*c*).

1. *b.* In the discussion of the cases, that arose on the detention of the *British* ships in *Russia* by the late Emperor *Paul* in the year 1800, it was admitted in both Courts, that, in the ordinary case of an embargo, a seaman hired by the *month*, and remaining with the vessel, has a right to his wages during the embargo, if the ship afterwards perform her voyage and earn her freight (*d*). (2) The circumstances of that detention

(*c*) Liv. 3. tit. 4 *Loyers des Matelots*, art. 10.

(*d*) *Beale v. Thompson*, 3 Bos. & Pull. 405. & 4 East. 546.

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common action for that purpose; and said the voyage is then ended with respect to any man, when he is discharged from the ship, and then he is entitled to sue consistently with the articles. See also Limland v. Stephens, 3 Esp. N. P. C. 269. See also Hoyt v. Wildfire, 3 John. Rep. 518.; and Willendson v. The Forkoset, 1 Peters. Adm. Rep. 197.

As to discharging mariners abroad, see the act of Congress, 28. February, 1803, sect. 1 & 3. (6 U. S. L. 206.) which regulates the manner and circumstances under which mariners may with their own consent be discharged abroad, ante 165, note and appendix.

Where foreign seamen are shipped at a foreign port in a foreign ship, and in the course of the voyage are *discharged*, if the articles of shipping contain a clause that they shall not sue for their wages in a foreign country, but shall abide by the maritime code of their own country, the courts of law in England will not sustain a suit for the wages. Gienar v. Meyer, 2 H. Bl. 603., cited post, p. 441., and see the note there.

(2) See also Jones v. The Insurance Company, 4 Dall. Rep. 246., and Kingston v. Girard, 4 Dall. Rep. 274. Marshall v. Montgomery, 2 Dall. Rep. 170. In this last case the point was directly decided by the court, conformably to the text.

were very peculiar. The cases will be more fully stated, when I come to the consideration of the loss of wages (*e*).

2. SECONDLY, it was determined before the passing of either of the statutes, which regulate the service of seamen in merchant ships, that a seaman, who was impressed from such a ship into the royal service, was entitled to receive a proportion of his wages up to the time of impressing, the ship having afterwards arrived in [426] safety at her port of discharge (*f*). It has also been since decided that he is entitled to no more (*g*). The first of those statutes expressly provides, that a seaman belonging to any merchant ship, who enters into the service of his Majesty on board any of his majesty's ships, shall not for such entry forfeit the wages due to him during the term of his service in the merchant ship, nor shall such entry be deemed a desertion (*h*). It has also been decided, that a seaman belonging to a privateer, who was to have a certain share of prizes in lieu of wages, and who had engaged to serve full six months on pain of forfeiting such share, did not lose his share of a prize taken while he was in the privateer, by being afterwards impressed, and then accepting the bounty, and entering on board one of his Majesty's ships before the expiration of the six months (*i*). (1)

(*e*) Chap. 3. of this part, sect. 2. *b*.
(*f*) *Wiggins v. Ingleton*, 2. Ld. Raym. 1211.
(*g*) *Clements v. Mayborn*, in the King's Bench, Trin. T. 24 *Geo.* 3.
(*h*) 2 *Geo.* 2. *c.* 36. *s.* 13.
(*i*) *Paul v. Eden* in the King's Bench, E. T. 25 *Geo.* 3.

(1) Where a ship has been captured and a mariner taken away from the ship and afterwards the ship is rescued, by the crew, full wages have been decreed for the whole voyage to the

3. If a seaman falls sick and dies during the voyage, the laws of *Oleron* (*k*), of *Wisbuy* (*l*), and of the *Hanse-Towns* (*m*), direct that his wages shall be paid to his heirs, in general words, without distinction as to the terms upon which he was hired: and it is not clear whether the payment thus directed, is to be understood of a sum proportionate to the time of his service, or of the whole sum that would have been [427] earned if he had lived to the end of the voyage. The *French* Ordinance distinguishes between the case of a hiring by the *month*, and a hiring for the *voyage;* and in the first case directs the payment of wages up to the day of the death of the seaman: in the last case, it directs the payment of half the stipulated sum, if a seaman dies on the voyage outward, and the whole, if he dies on the voyage homeward (*n*). A similar rule had been laid down in the case of a hiring by the voyage, in

(*k*) Art. 7.
(*l*) Art. 19.
(*m*) Art. 45.
(*n*) Liv. 3. tit. 4. *Loyers des Matelots.* art. 13 & 14.

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mariner taken away. So where a neutral mariner has been impressed from a neutral ship, and afterwards, escaped and rejoined his ship, or has offered to rejoin, but has been refused, full wages for the voyage have been decreed. On the contrary where a neutral mariner has been impressed and never rejoined the ship, either from *necessity* or *choice*, full wages have been denied. But pro rata wages seem due, in the one case to the time when the mariner might have rejoined the ship; in the other to the time of impressment. Watson v. Ship Rose, 1 Peters. Adm. Rep. 132. Hart v. Little John. id. 115. Howland v. Lavinia, id. 123. Lingstrom v. The Schooner Hazard, 1 Peters. Adm. Rep. 384., affirmed in the Circuit Court of U. S. See post, 446. note.

the Ordinance of the Emperor *Charles the Fifth* (*o*), which regulated the commerce of the Low Countries; and *Cleirac* and *Valin* (*p*) say, that the same rule was established by the *Consolato del mare*. There is no general decision on this subject in our law books: but the legislature appears by the provisions of a late statute to have considered that some wages might be owing to seamen who died in the course of a voyage (*q*); and in the case which I am about to quote, it seems to have been admitted, that the representatives of a seaman hired by the *month*, would be entitled to a proportion of wages to the time of his death (1). The facts of the

(*o*) *Cleirac* on the 7th article of the laws of *Oleron*.
(*p*) On the *French* Ordinance, ubi supra.
(*q*) 37 *Geo.* 3. c. 73. sect. 5. & 7.

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(1) In Beale v. Thompson, 3 Bos. & Pull. 425., Mr. Justice Heath said, "in case of a mariner's dying in the course of the voyage, it should seem, that he is entitled to a proportional part of his wages unless he be excluded by the specific terms of the contract." See also Comyns on Contracts, 377.

The expressions in the laws of Oleron, Wisbuy, and the Hanse Towns above cited, are as follows—"If the vessel be ready for her departure, she ought not to stay for the said sick party, but if he recover, he ought to have his *full wages* (*il doit avoir son loyer tout comptant*), deducting only such charges as the master has been at for him; and if he dies his wife or next of kin shall have it." Art. 7. Oleron.—"If a seaman falls ill of any disease, and tis convenient to put him ashore, he shall be fed, as he was aboard, and have somebody to look after him there; and when he is recovered, be *paid his wages* (*sera paye de les gages*); and if he dies his wages shall be paid to his widow or heirs"—(ses gages et loyers seront payes a sa vefue ou a ses heretiers. Art. 19. Wisbuy. "If he recovers his health, he shall be *paid his*

case referred to were very particular, and the decision turned upon them. Before the passing of the statute (*r*) which limits the wages to be given [428] to persons for navigating a ship back from the

(*r*) 37 *Geo.* 3. *c.* 73. *s.* 3.

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wages as much as if he had served out the whole voyage ; and in case he dies, his heirs shall have what was due to him." (Il sera paye de ses gages *tout ainsi comme, s'il avoit servy*, et s'il meurt, ses heretiers, *les retirerant entierement.*) Art. 45. Hanse-Towns.

As to the meaning of these various expressions, different decisions have been had in the Courts of the United States. In Pennsylvania Judge Peters decided that the meaning was *full wages for the whole voyage*, and that therefore in the cases before him the administrator of the deceased should recover the wages for the whole voyage. Walton v. Ship Neptune, 1 Peters. Adm. Rep. 142. A. D. 1800. Scott v. Brig Greenwich, id. 155. A. D. 1802. Jackson v. Sims, id. 157. A. D. 1806. And in this last case on appeal to the Circuit Court of the U. S., the decree was affirmed, Judge Washington upon solemn argument deciding that the full wages for the voyage were due.

On the other hand, in a recent case in the District Court of Massachusetts, Judge Davis held that *full wages* in the laws above cited, meant only full wages up to the time of the death of the mariner, and therefore decided against a claim for wages beyond that time. The learned Judge after a very minute and elaborate investigation of the various authorities, concluded by saying, " The examination which I have made on this subject has led me to an affirmative conclusion on the following points:

" 1. That by general principles of law, on a contract of hire no compensation can be claimed beyond the death of the party hired. 2. That the laws of Oleron, of Wisbuy or of the Hanse-Towns do not provide, that in case of the death of a seaman on a voyage, wages are recoverable beyond the time of his death.

West-Indies to this country, one *Cutler* was hired as second mate on a voyage from *Jamaica* to *Liverpool;*

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3. That the intent of those ancient ordinances in the articles relied on in this case, was to determine the effect and operation of sickness or disability incurred in the service of the ship during the voyage, and to provide for the payment of wages, *without deduction on that account*, either to the seamen, if he recover his health, or to his heirs in case of his death. 4. That it does not appear that those ordinances have, in those countries where they are peculiarly authoritative, been used and applied as entitling the heirs to wages for any time subsequent to the death of a seaman. 5. That approved commentators, such as Cleirac and Valin do not establish the construction contended for in support of this claim. 6. That the *Consolato del Mare*, a work of approved authority in case of an engagement by the *month*, and death on the voyage, expressly limits the wages to be recovered by the heirs to the time of the death of the mariner. 7. That the law marine has not been otherwise understood and received in England, but in regard to an engagement by the month and death on the voyage, appears to be consonant to the *Consolato del Mare*. 8. That in Massachusetts, the usage has uniformly been to make payment of wages in such case only to the time of the death of the seaman, and the law has been considered as consonant to the practice." Natterstrom v. The Ship Hazard. District Court, A. D. 1809.

The civil law provided that " he who has hired his services is to receive his reward for the whole time, *if it has not been his fault*, that the service has not been performed. Dig. law, 38. p. 58.

By the common law anciently, no contract for wages was considered as apportionable. Bro. Apportionment, pl. 13. id. Laborers, pl. 48. id. Contract, pl. 31.

But it seems that by the common law, as now understood, all laborers by the year or month, are entitled to wages up to

and at *Jamaica*, the master subscribed and delivered to him the following note. "Ten days after the ship G. "P. myself master, arrives at *Liverpool*, I promise to "pay to *Mr. T. Cutler*, the sum of 30 guineas, "provided he proceeds, continues, and does his "duty as second mate in the said ship, from

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the time of *their death*. And Lawrence J. in Cutter v. Powell, 6 T. Rep. 320. said, "with regard to the common case of an "hired servant to which this has been compared; such a ser- "vant though hired in a general way, is considered to be hired "with reference to the general understanding upon the subject, "that the servant shall be entitled to his wages for the time he "serves, though he do not continue in the service during the "whole year." See also Worth v. Viner, 3 Vin. Abr. 8. 9.

But if a mariner be at the time of his shipping afflicted with a mortal disease, of which he dies in the course of the voyage, it seems that he is not entitled to full wages. For at the time of shipment he was not able bodied, as the contract implied. Hæret lateri lethalies arundo. See Writer v. Ship Richmond, 2 Peters. Adm. Rep. 263.

Where the mariner is sick, he is by the marine law to be cured at the expense of the ship. But the act of the United States, 20. July, 1790, (1 U. S. L. 134. ch. 29.) sect. 8. having provided that the ship shall be furnished with a medicine chest and in default, that the master shall pay for all advice, medicine, and attendance of physicians, Judge Peters reluctantly considered that upon the construction of the act, if a medicine chest were furnished, the medical *advice* must be paid for by the seaman at his own expence; but that the other expences were a charge upon the ship. Walton v. Ship Neptune, 1 Peters. Adm. Rep. 142. Hastings v. Ship Happy Return, id. under p. 255. note.

" hence to the port of *Liverpool*. *Kingston*, July
" 1793." The ship sailed from *Kingston* on the 2d
August, and arrived at *Liverpool* on the 9th of *Octob*
Cutler went on board the 31st of *July*, sailed in
ship, and proceeded, continued, and did his duty
second mate until his death, which happened on the 2
September. It was proved, that the wages usually p
to a second mate of a ship on such a voyage, if hir
by the month out and home, were 4*l*. per month; t
when seamen were shipped by the run from *Jamaica*
England, a gross sum was usually given; and that
usual length of a voyage from *Jamaica* to *Liverpool*
about *eight* weeks. The executrix of *Cutler* brought
action against the master, and it was contended on
behalf, that she ought to recover a proportion of
wages for that part of the voyage that he lived, a
served on board the ship. The Court of King's Ben
before which this question was brought for decisi
directed inquiry to be made as to the usage amc
merchants, &c. in cases of this kind; but
[429] satisfactory information being obtained as to
usage, although such notes had been often giv
the Court, upon consideration of the particular terms
the note, and of the great excess of the sum to be p
to *Cutler*, if he had performed the whole voyage acco
ing to those terms, above the usual rate of wages up
a monthly hiring, decided that nothing was payable
the partial service: declaring at the same time, tha
the plaintiff could have proved a usage to pay a p
portional sum in similar cases their decision should ha
been conformable to the usage (*s*).

(*s*) *Cutler v. Powell*, 6 Ter. Rep. K. B. 320.

In a subsequent case also it was taken for granted, t some wages were due to the mate of a *West-India* p, who had died on the homeward voyage. The ster had, in pursuance of the directions of the statute ore mentioned (*l*), paid to the receiver of the sixpen- duty for Greenwich Hospital the sum of 9*l.* as the l amount of the wages due. The administratrix of e deceased, contending that more than 9*l.* was due, ought an action against the master, who insisted, that he had accounted upon oath according to the direc- ons of the statute, the amount of the sum due, could t be questioned in such an action, but he must be ed for the penalty given by the statute, if his account as false. But the Chief Justice of the Court of Com- on Pleas, (*Sir James Mansfield*) before whom the ause was tried, and afterwards the whole Court, eld that the statute did not deprive the admin- [430] tratrix of her right to sue the master for all at was justly due beyond the sum paid to the officer, nd as the Jury had found 25*l.* to be due, she was al- wed to recover 16*l.* (*u*).

4. The payment of wages is generally dependent upon e payment of freight: if the ship has earned its freight, e seamen who have served on board the ship, have in e manner earned their wages. And as in general, if hip destined on a voyage out and home has deliver- her outward bound cargo, but perishes in the home- rd voyage, the freight for the outward voyage is due, in the same case the seamen are entitled to receive ir wages for the time employed in the outward voy- and the unloading of the cargo, unless by the terms

) 37 *Geo.* 3. *c.* 73. *s.* 5 & 7.

(*u*) *Armstrong v. Smith*, 1 Bos. & Pull. N. R. 299.

of their contract the outward and homeward voyages are consolidated into one (*x*). And if a ship sails to several places, wages are payable to the time of the delivery of the last cargo (1). Upon the same principle, where money had been advanced to the owners in part of the freight outward, and the ship perished before her arrival at the port of delivery, it was held that the seamen were entitled to wages in proportion to the [431] money advanced (*y*). (2) If, as sometimes happens, a charter-party be so framed as to exclude the owners from demanding freight for the carriage of the outward-bound cargo, unless the ship brings back her homeward-bound cargo in safety, it seems that such a special agreement, whereby the owners consent to relinquish a benefit, to which they are entitled by the general principles of law, ought not to affect the seamen, or deprive them of their general right, unless, *they* also by the terms of their contract make the like

(*x*) *Anonymus*, 1 Ld. Raym. 639. 739. 12 Mod. 408. Ordin. of *Rotterdam*, art. 214. 2 *Magens*, 113.

(*y*) *Anon.* 2 Show. 283.

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(1) The same law was recognized in Giles v. Ship Cynthia, 1 Peters. Adm. 203. And in Millett v. Stephens, cited in page, 433, note, post. See also Luke v. Lyde, 2 Burr. 882., and Judge Winchester's decision, cited 1 Peters. Adm. Rep. 186. And if the ship be lost on the homeward voyage, the wages up to the last port of delivery and *half the time there* are to be paid. Johnson v. Brig Walterstorff, 1 Peters. Adm. Rep. 215.

(3) So Judge Winchester held that if a ship be lost before arrival at a delivering port, the wages are nevertheless earned, if the freight be advanced, cited 1 Peters. Adm. Rep. 186.

engagements on their part (1). Indeed it was once decided in the Court of Admiralty that the seamen, who had navigated a ship chartered by the *East-India* Company, and which had delivered her outward-bound cargo in the *East-Indies*, but was lost in the homeward voyage, were entitled to recover wages for the outward voyage from the master, although the owners had covenanted with the Company not to demand any freight beyond the imprest money, of which the seamen had received their share, unless the ship returned home in safety; and although the mariners themselves had given bonds to the master to the same effect with regard to their wages (*z*). And *Chief Justice Holt* is said to have decided a cause tried before him in the same manner (*a*). But this decision of the Court of Admiralty is reported to have been disapproved of by the House of Lords, who in a case arising out of it between the master and the owners, gave liberty to the [432] parties to appeal to the delegates against the decision (*b*). Indeed I am at a loss to find any principle upon which the Court of Admiralty could have held these bonds to have been void, and have thought the seamen entitled to more than a proportion of the advance money, unless the bonds were deemed to have been obtained by oppression or fraud. It has of late years been usual to stipulate by express terms in the articles of agreement signed by the seamen employed in such ships, that in

(*z*) *Buck v. Rawlinson*, 1 Bro. P. C. 102. 727.

(*b*) *Buck v. Rawlinson*, 1 Bro. P. C. 102.

(*a*) *Edwards v. Child*, 2 Vern. 102.

(1) The same point was established by Judge Winchester in a case cited in Peters. Adm. Rep. 186.

case the ship shall by the danger of the sea, or any other accident whatsoever, be disabled or lost during the voyage, for which she is destined, so that she do not return to and arrive at the port of *London*, the seamen shall not receive or claim any further wages than the impress money paid to them in advance, notwithstanding the ship shall at any time, before her being so disabled or lost, have broke bulk, or delivered any goods, at any port or place whatsoever. And there is no instance of a claim made by the seamen against the terms of this clause in the articles.

4. *b.* By articles of agreement in the usual form (*c*) and containing the common stipulation, that "no seaman shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at her above-mentioned *port* of discharge, and her 433] "cargo delivered;" it was stated that the ship was bound for the ports of *Madeira*, any of the *West-India* islands or *Jamaica*, and to return to *London;* and in consideration of the monthly or other wages herein mentioned, the seamen severally undertook to perform *the above mentioned voyage*, and the master agreed with and hired them for the *said voyage*. The ship sailed from *London* with a full cargo for *Madeira*, and delivered it there, and took in a full cargo of wine: and sailed for the *West-Indies*. Part of the wine was delivered at *Dominica*, and another part at *Kingston* in *Jamaica*, and at this latter place the ship took in some government stores for *Port Anthonio* in *Jamaica*, which she delivered there, and then proceeded to *Martha Bray* in the same island, where she delivered the remainder of the wine, and took in her cargo for *London:* for

(*c*) Appendix, No. V.

which place she soon afterwards sailed, but was lost on the voyage home. One of the seamen who had been hired at monthly wages, brought an action, contending that the voyage was divided into three distinct parts, *viz. Madeira*, the *West-Indies*, and *home*, and that as freight had been earned for the two first parts, he was entitled to his wages up to the time of the ship's departure from *Martha Bray*. But the Court holding that the port of discharge mentioned in the articles meant *London*, determined that by reason of the special stipulation he could recover nothing (*d*). (1)

(*d*) *Appleby v. Dods*, 8 East. 300.

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(1) The same question has come before the courts of the United States, and received contrary determinations.

Judge Winchester (cited in 1 Peters. Adm. Rep. 186.) says, it has been usual to insert a clause in sailor's articles, "That "no wages shall be due or claimed until the return of the ship to "her home, and the cargo or ballast delivered,"—and it is contended by the ship owners, that upon the true construction of this clause, seamen lose all claim to wages in the event of a loss on the homeward voyage. On behalf of the seamen it is contended, that this clause only applies to wages dependant on the homeward voyage, and does not relate to wages antecedently earned. On the first view of this clause, the construction which presents itself as most consistent with the law of the United States, and *the justice of the case is*, that the parties could only intend it to apply to the *time* and *place*, in which the wages shall be legally demandable. But where the clause is so framed as to preclude all construction, and the intent of the parties is plainly expressed, the only question for consideration is the legality of such a stipulation.

In an agreement by seamen, that their wages shall depend upon the earning of the freight conformably to the *engagement*

5. If after the hiring of seamen, the owners [434] of a ship do not think proper to send her on

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with the freighter, there is nothing inconsistent with the provisions for their regulation and government. It is competent for them to connect their right of wages with the owners right to freight upon a voyage comprizing more than one port. The admission of the validity of this sort of agreement is predicated upon the fairness of the transaction, and a full and fair disclosure by the owners to the seamen. But the legality even of this agreement derogating from the general maritime law was denied in the case of Edwards v. Child, 2 Vern. 727., in which it is said Lord Holt made a similar decision. It is true the authority of this case has since been questioned and may be considered as overruled, *so far as it restrains agreements, by which wages are made to depend on the earning of freight, agreeably to the contract of affreightment*, but no farther ; for the very ground on which its authority is denied is the fact, which appeared in the cause, that the seamen had received their share of the imprest money, which was all that had been received by the ship-owners or captain.

The freight earned in a voyage constitutes a common stock, and in the hands of the owners is a trust fund to be accounted for to those whose industry produced it. A clause by which it should be stipulated, that he who bears the labour and hazard of acquiring the common stock, shall bear all the loss and not participate even the wreck of profit, is not consistent with any just notion of copartnership or common interest. It is wholly incompatible with every idea of a trust, to permit one to eat up the whole estate ; and, as an agreement to grant or cede it, is wholly destitute of all actual, as well as moral or equitable consideration. It is a *nude pact*. It is in its very nature fraudulent as to one of the parties ; and with a view to public policy, equally reprehensible from its tendency to separate the interest

the intended voyage, the seamen are to be paid for the time during which they may have been employed on

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from the duty of sailors, and induce them to repair by embezzlement, the loss which such an agreement subjects them to. I am therefore of opinion that the only legal effect of such a stipulation, is to preclude the seamen from libelling in foreign ports, until the vessel return or the voyage be ended; that it is invalid to produce a forfeiture of wages; and that upon solid principles of law and policy, freight must always be considered the mother of wages, and notwithstanding any agreement to the contrary, where the former is earned, the latter must be paid.

From the elaborate opinion of the learned Judge, the foregoing extracts are the more copiously made, because it presents a striking view of one side of the question. In Johnson v. Sims, 1 Peters. Adm. Rep. 215., on the construction of the following clause of a shipping paper, "no officer or seaman belonging to the said ship, shall demand or be entitled to his wages or any part thereof, *until the arrival* of the said ship at the abovementioned port of discharge in Philadelphia, Judge Peters decided that the clause amounted only to a stipulation not to be entitled to demand or receive *payment* of the wages but in Philadelphia. It did not alter the substance of the contract or the operation of law, but merely as *regarded the time and place of payment*. It was not a contract that the risk should be insured or the arrival guaranteed by the mariner.

The same principle was decided in an action brought by a mate to recover his wages upon the following case. The shipping paper contained this clause, "no officer or seaman shall "demand or be entitled to his wages, or any part thereof, *un-*" *til the arrival* of said vessel at Beverly, or her port of discharge "and her cargo delivered." The vessel arrived at Corunna, discharged her cargo, and thence sailed in ballast to Bordeaux,

board the ship (*e*). And if they sustain any special damage by breaking off the contract, it seems reasonable

(*e*) *Wells v. Osman*, 2 Ld. Raym. 1044.

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where she took in a cargo for Guadaloupe, and was captured on her passage to that island and condemned. It was contended, 1. That no wages were due on account of the above clause, the vessel never having arrived at her port of discharge; and 2. That if any wages were due, they were due only to the arrival in Corunna, and half the time the vessel lay there, that being the last port of discharge. But the Court, (Dana, C. J., Paine, Bradbury, Dawes, and S. Sewall, Js.) were of opinion that the clause in the shipping paper, related only to the *time and manner of payment* of the wages, agreeably to the act of Congress for the regulation of seamen in the merchants' service (1 U. S. L. 134. 140 sect 6.) which entitles the mariner to claim one third of his wages at every port of discharge, unless the contrary be expressly stipulated, and was not a condition precedent to the recovery of wages; and further, that Bordeaux and not Corunna, must be considered the last port of discharge: that the going there was without doubt a measure beneficial to the voyage, and adopted without the consent of the mariners, and over which they had no control. The Court accordingly adjudged wages to the plaintiff to the arrival of the vessel at Bordeaux, and half the time she was there. And *Dana*, C. J. said, that if by the crafty subtility of a merchant the word had been *unless* instead of *until*, he should hold it void as against the seaman, whom the Court were bound to protect against their own thoughtlessness and inconsideration. Mellett v. Stephens, Essex, November Term, S. J. C., A. D. 1800. MSS.

But in a subsequent case on an action brought by a mariner to recover wages, the shipping paper contained the following written clause, which before signing was explained to the mariners,—"And we do further agree and consent to ship for the

also that they should recover such damage by an action upon the agreement (2). The *French* Ordinance also

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" above-mentioned voyage" (which was from Salem to Hamburgh, and any other ports the master deemed it best to proceed to and back to Salem), " and that if any capture is made " of said brig or cargo by any vessel of war or any persons " whatsoever, and the vessel and cargo condemned or is res- " trained from the owners, then we agree that our wages that " may be due to us shall not be paid to us, or any part thereof " by the owners of said brig and cargo, until they recover back " said brig and cargo, or receive compensation for the same, " and if not recovered back nor no compensation therefor, then " we agree to bear the loss of all our wages, and to be satisfied " and contented with nothing more from the owner than our " months advance wages, which we have received." The brig sailed to Hamburgh and there discharged her cargo, and after taking in another cargo at that port, proceeded to Surinam and there delivered her cargo,and took on board another cargo, and on her passage to Salem was captured and condemned, and no compensation ever received by the owner. The cargo was insured to its full value, and the brig to two thirds of her value, which insurance had been paid,but the freight was not insured. The Court were of opinion that the plaintiff was not entitled to recover. Goodridge v. Peabody, &c. Essex, April Term, S. J. C., A. D. 1803. MSS.

(2) And in the Admiralty Courts proper compensation in the nature of damages will be allowed the seamen in such cases. But the amount is discretionary. Woolf v. Brig Oder, 2 Peters. Adm. Rep.261. The same principle is admitted as the law of the admiralty in 2 Brown. Civil and Adm. Law. 533. But if *after the voyage has commenced*, it is broken up by the act of the master or owner, the French Ordinance (Ord. lib. 3, tit. 4. art. 3.

directs the payment of wages for the time employed in equipping the ship in two other cases (*f*), which I do

(*f*) Liv. 3. tit. 4. *Loyers des Matelots*, art. 4 & 5.

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1 Valin, 686.) provides, that the seamen hired for the voyage shall be paid their entire wages for the voyage, and those hired by the month the entire wages due for the time they have served, and for the time necessary to enable them to return to the port of departure ; and both shall be paid for their maintenance until they arrive there. Pothier, in his remarks on this article (Louage de Matelots, n. 203.) says, " the master ought not to be discharged from his engagements, because the breaking up of the voyage was his own act, and a debtor cannot by his own act discharge himself of his obligation." In Hoyt v. Wildfire, 3 John. Rep. 518., Chief Justice Kent in delivering the opinion of the Court said, " that the rule on this subject in the English law does not, I apprehend, differ from the marine law of France, though I have not met with any adjudged case in point, and a recent nisi prius decision (Eaken v. Thom. 5 Esp. N. P. C. 6. cited post, 444.) looks strongly the other way." Lord Ellenborough in that case said the rule in general, that the ship must perform her voyage to entitle the seamen to wages. " But," says Chief Justice Kent, " the rule that the voyage must be performed is certainly not universal, and without exception. A voyage lost by the fraud or misconduct of the master, and that so palpable as not to be denied, is not within the reason that freight is the mother of wages. The counsel for the plaintiff in Abernethy v. Landale, Douglas. 539., stated it to have been held that if a ship be seized for debt, or for having contraband articles on board, the sailors had a right to the wages up to the time of seizure. What decision or authority was alluded to, does not appear ; but this is undoubtedly the settled doctrine in the treatise on the English marine

not find mentioned in the more ancient sea-laws; these are, the prohibition of commerce by the government of the country, to which the ship belongs with the country to which it is destined, (which must always take place if a war happens between the two countries) and an embargo imposed in the lading port. The latter case does not in general dissolve the contract between the owners and the merchant by the law either of *France* or *England*, as I have already mentioned (*g*), yet it may be reasonable on such an occasion to discharge the greater

(*g*) *Ante*, part 3. chap. 11. sect. 4.

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law." The learned Judge then cited the same doctrine from the Sea Laws, p. 457. Malyne, p. 105. And in the principal case, where the ship had been condemned for having contraband goods on board, and the mariner was shipped on a different voyage from that, which under a pretended necessity was pursued, the learned Judge stated it as the opinion of the court, that the mariner was entitled in *a common action for wages*, to recover for his wages from the time he shipped on board, until his return to the port of departure, deducting the sums paid him in advance, and the wages received while in another service.

Molloy (vol. 1. p. 354. book 2. ch. 3. sect. 7.) is of the same opinion. And Roccus seems to think that the seamen are entitled to their stipulated wages, if the voyage is not performed, provided they have been guilty of no fault, by which their wages would be forfeited. De nav. et naulo, n. 43. cited in a note to 3 John. Rep. 322. in the case above stated.

The general doctrine as to the right of the mariners to their full wages, is recognized by Judge Peters in Woolf v. Brig Oder above cited, and Moran v. Baudin, 2 Peters. Adm. Rep. 415., and Quirk v. Ship Penelope, id. 276., and Hindman v. Shaw, 2 Peters. Adm. Rep. 264.

part of the mariners, who may readily find in other ships an employment equally beneficial to themselves, and are therefore not likely to sustain or recover special damage to any considerable amount by the non-performance of the contract made with them. But if they [435] continue with the ship, they will, if hired by the *month*, be entitled to their wages during the period of detention (*h*).

6. In the case of shipwreck it is the duty of the seamen to exert themselves to the utmost to save as much as possible of the vessel and cargo. If the cargo is saved, and a proportion of the freight paid by the merchant in respect thereof, it seems upon principle that the seamen are also entitled to a proportion of their wages, and this is expressly directed by the *French*

(*h*) *Beale v. Thompson*, 3 Bos. & Pull. 405.

In case the voyage is broken up *before the departure* of the ship, the French Ordinance (ubi supra) provides, that the seamen, if hired by the voyage, shall be paid for the time taken up in rigging and equipping the ship, and have one fourth of their wages; and those engaged by the month shall be paid in proportion, regard being had to the ordinary length of the voyage. Valin says (p. 687. 688. vol. 1.) that the Consolato del mare, gives in a like case to the seamen hired by the voyage one half instead of a fourth. As to seamen hired by the month he says, that they are to be paid for the days employed in equipping the ship, but how much beyond this, is difficult to ascertain from the language of the ordinance; but on the whole he considers that the correct rule will be to give to such seaman one fourth of the wages, which would ordinarily be earned in the course of such a voyage, at such monthly wages.

Ordinance (*i*). And for their labour in saving the cargo or the remains of the ship, they as well as other persons, may be entitled to a recompense by way of salvage. By the laws of *Oleron* (*k*), if in the case of shipwreck "the seamen preserve a part of the ship and "lading, the master shall allow them a reasonable con- "sideration to carry them home to their own country: "and in case they save enough to enable the master to "do this, he may lawfully pledge to some honest per- "sons such part thereof as may be sufficient for the oc- "casion." By the laws of *Wisbuy* (*l*): "the mariners "are bound to save and preserve the merchandize to "the utmost of their power, and whilst they do so, (*ce "faisant*, according to the *French* translation,) ought to "be paid their wages, otherwise not." By the *Hanseatic* Ordinance (*m*), "if a ship happens to be "cast away, the mariners are obliged to save as [436] "much as in them lies, and the master ought to "requite them for their pains to their content, and con- "vey them at his own charge to their dwelling places; "but if the mariners refuse to assist the master, in such "case they shall have neither reward nor wages paid "them." It is not quite clear from the language of these ancient Ordinances, whether the payment directed to be made to seamen on those melancholy occasions, is to be a reward only for their labor in the salvage, or a recompense for their former services in the ship, for which according to general principles they are entitled to no payment, if no freight is earned. But *Cleirac* in his commentary on the laws of *Oleron* (*n*) says, that by

(*i*) Liv. 3. tit. 4. *Loyers des Matelots*, art 9.
(*k*) Art. 3.
(*l*) Art. 15. According to the translation in *Malyne*.
(*m*) Art. 44.
(*n*) Art. 3.

an Ordinance of *Philip the second* of *Spain*, made in the year 1563 (*o*), it is ordained, that the seamen shall save as much as they can from shipwreck, and in that case the master is bound to pay them their wages, and to give them a further reward for their labor out of the goods. And the *Hanseatic* Ordinance of the year 1614 (*p*) expressly directs, that if so much of the ship be saved as equals the value of the wages of the seamen, they shall be paid their whole wages. In like manner the Ordinance of *Rotterdam* (*q*), and the *French* Ordinance (*r*), also expressly direct the payment of wages out of the relicts and materials of the ship.

I have not been able to find any decision of an [437] English Court on this point, and the legislature has made no provision relating to it. As an inducement to the mariners to exert themselves in the hour of danger, it may not be unfit to hold out to them the prospect of obtaining their wages, if they save so much of the ship as shall be sufficient to pay them; but their claim upon the ship seems not to extend to a case, wherein according to the principles of the law, upon which their claim is founded, no wages are payable to them (1).

(*o*) Tit. *Average*, art. 12.
(*p*) Tit. 9. art. 5.
(*q*) Art. 219. 2 *Magens*, 114.
(*r*) Liv. 3. tit. 4. *Loyers des Matelots*, art. 9. and *Valin* thereon.

(1) But Judge Winchester, in a case cited in 1 Peters. Adm. Rep. 186., seemed to consider wages as due in such a case. He said, "the contract of the sailors is a species of copartnership between them and the owners. If all is lost the sailors lose their wages; but if all is not lost, that which remains of ship and freight is a common property pledged for the payment of

7. LASTLY. As to the *time* of payment.

By the articles of agreement annexed to the statute (*s*) made for preventing the desertion of seamen from ships trading to the *West-Indies*, and which are in common use for other voyages also, it is stipulated, that the seamen shall not demand or be entitled to any part of their wages until the arrival of the ship at the intended port of discharge, and delivery of her cargo, or in less than *twenty days* if they are not employed in such delivery. The port of discharge here mentioned seems by the form of the articles to be the foreign port, to which the outward-bound cargo is destined: but I rather conceive it to be meant of the port of discharge and delivery at the ship's return to this country; for,

(*s*) 37 *Geo.* 3. *c.* 73.

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wages. Freight gained and put on shore in the course of the voyage is saved from a subsequent shipwreck. It goes into the common stock; *but like the savings from a wreck is to the last nail and cable hypothecated to the wages.* Even after abandonment to underwriters, it is still pledged in their hands to the sailors." See also the decisions of Judge Peters in Giles v. Brig Cynthia, 2 Peters. Adm Rep. 203, and Weeks v. Snow Catharina Maria, id. 424. Frothingham v. Prince, 3 Mass. Rep. 568 Taylor v. The Cato, 1 Peters. Adm. Rep. 54. Dunnett v. Tomhagen, 3 John. Rep. 154. In this last case the ship and cargo were abandoned at sea, and the crew took seven boxes of the cargo in the boat which were afterwards carried into the port of destination by the crew of another ship, the court held that no *wages*, as such, were due, because no freight was earned; but the mariners might be entitled to a compensation in the nature of *salvage*, as an equitable lien on the goods saved by them in the boat.

unless the voyage and stipulated service of the seamen terminate at the foreign port, only *half* the wages [438] then due can be paid there; the legislature having enacted as a general law, "That no master "or owner of any merchant ship or vessel shall pay or "advance, or cause to be paid or advanced, to any sea-"man or mariner, during the time he shall be in parts "beyond the seas, any money or effects upon account of "wages, exceeding *one moiety* of the wages, which shall "be due at the time of such payment, until such ship or "vessel shall return to *Great Britain*, or *Ireland*, or the "plantations, or to some other of his Majesty's domin-"ions whereto they belong, and from whence they were "first fitted out; and if any such master or owner of "such merchant ship or vessel shall pay or advance, or "cause to be paid or advanced, any wages to any sea-

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If a ship in distress be abandoned by the master and all the crew, except one man, who is left either by design or accident, he is discharged from his contract as a mariner of that ship and becomes entitled to salvage. Mason v. Ship Blaireau, 2 Cranch. Rep. 240. So in case of abandonment, and subsequent salvage *by the crew*, they are entitled to compensation. Taylor v. The Cato, cited above.

In the above cited case of Frothingham v. Prince, the Court held that the insurer *on the ship* was bound to pay to the owner the wages of seamen, which the owner had been compelled to pay the insurer having received salvage from the wreck of the ship beyond that amount. The ship had been wrecked in her homeward voyage, and the cargo and freight wholly lost. The whole wages to the time of the loss were allowed. This does not distinctly appear from the report; but I have examined the record.

"man or mariner above the said moiety, such master "or owner shall forfeit and pay *double* the money he "shall so pay or advance, to be recovered in the High "Court of Admiralty by any person who shall first dis- "cover and inform of the same." (*t*)

And by the articles of agreement prescribed by the statute made to regulate the manner of carrying slaves in *British* ships from the coast of *Africa* (*u*), the master engages "to pay *one month's* pay after the land- "ing of the slaves in the *West-Indies*, or *Amer-* [439] "*ica*, ten days before the sailing of the ship on "her homeward-bound passage." And the officers and mariners engage "not to demand their wages, or any "part thereof, except the value of the *fourth* part of "their wages to be supplied in *slops* (*x*) or other neces- "saries, and one month's pay, with their short allow- "ance money then due, in the *West-Indies*, or *America*, "until the ship's arrival at her delivering port (*y*), ex- "cept they shall be impressed or enter on board any of "his Majesty's ships (*z*), or be discharged by mutual "consent agreeable to the certificate specified in the "act."

Policy requires that the wages of seamen should not be paid to them in foreign countries, as well to prevent desertion, as to preserve, for the benefit of their families, the money, that might otherwise be spent in idleness and debauchery. The *French* Ordinance, so often

(*t*) 8 *Geo.* 1. *c.* 24. *s.* 7. This statute was made perpetual by 2 *Geo.* 2. *c.* 28 *s.* 7. A similar provision is contained in the 12th section of the *statute* 12 *Geo.* 2. *c.* 30. with respect to ships licensed to carry sugar from his Majesty's sugar colonies in *America* to foreign parts of *Europe*.

(*u*) 39 *Geo.* 3. *c.* 80. Schedule A.

(*x*) By the 30th section of this statute, the master must not supply slops, tobacco, spirits, or any other article whatever beyond this amount.

(*y*) This appears by the articles to be a delivering port in *Europe*.

(*z*) *Ante*, part. 2. chap. 4. sect. 6.

quoted, has made no provision on this subject, but t
defect has been supplied by subsequent Ordinances
that country, which prohibit the payment of wages i
places to which the ship does not belong, without the
consent of the *French* consul in a foreign country, and
in *France* of the officers of the classes (*a*). The Ordi
nance of *Rotterdam* (*b*) having enacted, "Tha
[440] "the *full* wages of the ship's company shall a
"ways be deemed to be earned, whether, on
"or more complete voyages have been made in foreig
"parts, even though the ship should afterwards happe
"to be lost," adds, "that the master shall be obliged t
"pay to his people every time, if they require it, a
"least the *half*;" "but that when any dispute arises
"they shall not go to law in foreign parts, nor give on
"another any trouble, on forfeiture of what wages o
"monthly pay shall remain unpaid." By the article
of agreement for service in a *Dutch* ship, which wer
proved in evidence at the trial of an action, brought i
this country by a seaman against the master fo
wages (*c*), it was stipulated, that in case one or mo

(*a*) *Pothier*, Louage des Matelots, *sect.* 2. § 3.

(*b*) 2 *Magens*, 113. 114.

(*c*) *Gienar* v. *Meyer*. 2 Hen. Blac. 603 In consequence of the concluding clause of these articles, it was held that the action could not be maintained although the vessel ha been seized by an English ship brought into this country, and sol here, under the authority of th Government; the master and crew not being made prisoners.*

* But see Sigard v. Roberts, 3 Esp. N. P. C. 71. cited post, p. 44 and Lamland v. Stephens, 3 Esp. N. P. C. 269. cited post, 451. See al Wallenden v. The Forsoket, 1 Peters Adm. Rep. 197 This last w the case of a Danish seaman suing for wages, under articles like tho mentioned in Hulle v. Heightman, in the text. He alledged that he w discharged; but the master agreeing to take him on board again, Jud Peters declined jurisdiction; but he said where the voyage had end here, or had been broken up, or the seamen had been grossly oppr sed.

complete voyages should be made out of the country, the master should at every *second* place of delivery secure to the seamen *two-thirds* of their wages by an order on his purser or correspondent at *Rotterdam ;* but that none of the seaman should institute any suit against the master in foreign countries. By the articles of agreement made at *Altona* for service in a *Danish* ship, which were proved in the like manner at another trial (*d*), it was stipulated that no one should [441] demand any money, while abroad, from the master, but every one should content himself with the money received upon hand, until the completion of the voyage to the satisfaction of the master and his owners, and until such time as the ship should have arrived at *Altona* ; and it should at all times be at the option of the master to give them money while abroad, or not.

By the law of *America* a seaman is entitled to receive *one-third* of his wages due to him at every port, where the ship unlades, and delivers her cargo before the voyage is ended, unless the contrary is expressly stipulated in the contract (*e*). (1)

(*d*) *Hulle v. Heitman*, at Guildhall. coram *Le Blanc*, J. Sit. p. M. T. 1801. 2 East. Rep. 145.

(*e*) Acts of *Congress* of 1790, *c.* 29. *s.* 6.

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(1) What constitutes a port of delivery has been a subject of controversy in several cases. If the ship be bound on a trading voyage and go to some ports with a cargo, and to others in ballast, it has been a question, where the ship has been afterwards lost, whether wages were due beyond the time of the last delivery of cargo. In Giles v. Brig Cynthia, 1 Peters. Adm. Rep. 203., where the ship went on a trading voyage to the Bay of Honduras, for the purpose of loading with woods and other productions of that coast, and after going to several ports, was

3. The *time* of payment of wages is also regulated and enforced by the statutes before referred to.

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wrecked on her passage to Jamaica, Judge Peters said, "freight does not always imply that it is naulum merces, or fare for the transportation of goods; it is applied to all rewards, hire or compensation paid for the use of ships, either for an entire voyage, are divided into sections, or engaged by the month, or any period. There can be no distinction in reason and law, whether this freight or hire be actually paid, by one for the use or chartering of the vessel of another; or whether he sends his own vessel for, or with a cargo to a designated port; which cargo is to be obtained with funds or credit there, or goods, money or bills sent in and with the ship. The services of the seamen entitle them to their wages for that portion of the voyage they have so far completed. A port of destination, it will be seen, is in this respect, the same as a port of actual delivery. And it matters not that the vessel did not carry thither any goods, but went in ballast. She earns her freight and the wages are due out of it, as much in legal contemplation as if she had been fully laden; so it is if she *be partially laden, as in this case.* Was it ever known that wages were appointed according to the quantum of cargo the merchant chooses to ship? If a merchant sends the vessel of another for cargo to a designated port and obtains none, he who hired the ship must pay, *empty for full.* Why then should the case of the sailor not depend on the same principle, and have the same measure meted to him, both in the case of the vessel sent by the owner, and that of one chartered?" And the learned Judge decreed wages to be paid to the bay of Honduras. See also Cranmer v. Gernon, 2 Peters. Adm Rep. 390.

Judge Winchester (in 1 Peters. Adm. Rep. 186.) says, "If the parties stipulate that the vessel shall proceed to A. to receive a cargo, and go from thence to B. and unlade the same, and

Thus, as to ships engaged in *foreign voyages*, it is enacted, that upon the arrival of any ship in *Great Britain* from parts beyond the seas, the master or commander shall be obliged to pay the seamen thereto belonging their wages, if demanded, in *thirty days*, after

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receive on board another with which to proceed to C.; upon the arrival and delivery of which last cargo at C., a certain freight shall be paid and not otherwise, the voyage does not terminate until the arrival at C.; *nor are A. and B. ports of delivery at which freight is earned.* But as this construction arises from the agreement of the owners and freighters, it can in no wise influence the right of the seamen, relatively to whom the agreement has no operation. Every port where an outward cargo is unloaded, is to them a port of delivery, and wages to that time are earned."

The above case of Giles v. The Cynthia, was distinguished by Judge Peters from Hernaman v. Bawden et al. 3 Burr, 1844. He said the voyage there was from England to Spain, with a load of fish to be caught on the banks of Newfoundland, where the ocean and not a port of delivery afforded the cargo; and the voyage was in its nature and objects entire.

So in Marshall v. Montgomery, 2 Dall. Rep. 170., where a ship at the Havana was hired to go to New Providence, in company with Spanish Troops, at a certain sum per ton. The Ship went to Providence, received her payment, and afterwards on the voyage home, was captured and the money lost. The Court said, the sum agreed to be paid has been received; it is called freight by the intendant, who hired the ship. It is certainly a compensation for the use of the ship; it is an earning by the owners, and the whole object of the voyage was completed at Providence. This may be considered in the spirit of the law as a port of delivery. With the loss that happened afterwards the sailors have no concern.

the ship's entry at the custom house, except in case where a covenant shall be entered into to the contrary, or at the time the seamen shall be discharged, which shall first happen, if demanded, deducting the penalties and forfeitures imposed by the act, "under the penalty
"of paying to each seaman or mariner, that
[442] "shall be unpaid, contrary to the intent and
"meaning of this act, *twenty shillings* over and
"above the wages that shall be due to each person, to
"be recovered by the same means and methods as the
"wages may be recovered; and such payment of wages
"aforesaid shall be good and valid in law, notwithstand-
"ing any action, bill of sale, attachment, or incumbrance
"whatsoever (*f*)."

And as to ships employed in the *coasting trade* in the manner before mentioned, it is enacted, that the master, commander, or person having charge of the ship, shall be obliged to pay the seamen their wages, if demanded, within *five days* after the ship shall be entered at the custom-house, or the cargo be delivered, or at the time the seamen shall be discharged, which shall first happen, unless an agreement shall have been made to the contrary, in which case the wages shall be paid according to such agreement, deducting in every case the penalties imposed by this act, under the like forfeiture of *twenty shillings*, to be recovered in the same manner as with regard to ships coming from abroad; and such payment shall be good in law, "notwithstanding any "action, bill of sale, attachment, or incumbrance what-"soever" (*g*).

As to ships employed in the *slave trade;* It is enacted that upon the arrival of every ship at her discharg-

(*f*) 2 *Geo.* 2. *c.* 36. *s.* 7. (*g*) 31 *Geo.* 3. *c.* 39. *s.* 5.

ing port in *Great Britain*, the officers and seamen therein shall be continued in *full* pay and provisions, until the ship is cleared inwards, or their ac- [443] counts are settled and paid (*h*). But no time of payment being mentioned in the body of this statute, or in the articles annexed to it, I apprehend the general rule before mentioned, with respect to ships coming from abroad, applies to ships engaged in this trade also (1).

(*h*) 39 *Geo.* 3. *c.* 80. *s.* 34.

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(1) The act of Congress regulating seamen in the merchants' service, 20. July, 1790. (1 U. S. L. 134. ch. 29.) sect. 6. provides that, "as soon as the voyage is ended and the cargo or "ballast be fully discharged at the last port of delivery, every "seaman or mariner shall be entitled to the wages which shall "be then due according to his contract, and if such wages shall "not be paid within *ten* days after such discharge," it authorizes admiralty process against the master and the ship. In Edwards v. Ship Susan, 1 Peters. Adm. Rep. 165., Judge Peters held that the time run from the end of the voyage, and not from the unlivery of the cargo: but occasionally he said he had allowed *fifteen* working days, where the circumstances of the case seemed to require them, conceiving that the obscurity of the act as to this subject allowed him that discretion. See also Hastings v. Ship Happy Return, 2 Peters· Adm. Rep. 253. And in this last case Judge Peters seemed to think, that although seamen at a foreign port of delivery were bound under the penalty of forfeiture of wages, to unlade and reload the ship; yet that on the homeward voyage, their duty ended with the arrival of the ship at her last port of delivery, and being there safely moored. The wages were then due, though not payable until ten days afterwards. Debitum in presenti, solvendum in fu-

turo. And he considered there was a difference between the wages of *navigation*, and the wages of *loading* and *unloading;* and he cited the Art. 5. of the Laws of Wisbuy to this effect.

And Roccus (De nav. et naulo, n. 43.) is of opinion, that the wages are due whenever the master discharges the mariner, although the voyage be not completed. Salarium nautæ debetur, quando navis magister ante tempus conventionis completum, licentiam ei dederit, aut eum in terram reliquerit et per eum servire non steterit.

And in an action brought by a sailor against the captain to recover wages, wherein it appeared that by written articles the plaintiff was to go the voyage from Hamburg to Tranquebar, and from thence to any port the captain should think proper, and from thence to Hamburgh, or any other port of delivery; and one of the clauses was, that no seaman was to demand money until the voyage was ended, the cargo unloaded, &c.; the ship on her return voyage, bound to Hamburgh, was captured and brought into the Downs, where the plaintiff came on shore with a boat from the ship, accompanied with the second mate and the surgeon, and on being required to get on board, he and the other seamen said they had no victuals for the whole day, and only requested to stay till they had some, and being left on shore, they returned to the ship the next morning, when the Captain refused to receive them, and dismissed them and refused to pay them, Lord Eldon held that the Captain had discharged the seamen, and that the plaintiff was entitled to recover his wages. The voyage is then ended with respect to any man when he is discharged from the ship, and then he is entitled to sue consistently with the articles. Sigard v. Roberts, 3 Esp. N. P. Cas. 71. See also Limland v. Stephens, 3 Esp. N. P. Cas. 269. cited page 451. note.

CHAPTER THE THIRD.

OF THE LOSS AND FORFEITURE OF WAGES.

THE wages of seamen, whether hired by the month or for the voyage, are sometimes lost without any fault on their part; and sometimes forfeited by their misconduct.

FIRST, as to the *loss* of wages.

1. In order to stimulate the zeal and attention of this class of persons, who are often engaged in very perilous services, the policy of all maritime states has made the payment of their wages to depend on the successful determination of the voyage (*a*). If by any disaster happening in the course of the voyage, such as the loss or capture of the ship, the owners lose [444] their freight, the seamen also lose their wages (1).

(*a*) *Molloy*, book 2. ch. 3. sect. 10. 1 Sid. 179. *Abernethy v. Landale*, Doug. 539. *French* Ordinance, liv. 3. tit. 4. *Des Loyers des Matelots*, art. 8.

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(1) This doctrine seems universally admitted in our Courts. See Judge Winchester's opinion in 1 Peters. Adm. Rep. 186. note. And Judge Peters' opinion in Giles v. Brig Cynthia, id. 203. Johnson v. Sims, id. 215. Taylor v. The Cato, id. 54. See also Hoyt v. Wildfire, 3 John. Rep. 518. Brooks v. Dorr, 2 Massa. Rep. 39. Mason v. Ship Blaireau, 2 Cranch. Rep. 240. Dunnett v. Tomhagen, 3 John. Rep. 154.

And if the ship and freight be insured and recovery of the loss had by the owner, this will not entitle the mariner to wages in such case. M'Quirk v. Ship Penelope, 2 Peters. Adm. Rep. 276. Goodridge v. Peabody, cited ante p. 433.

So if the ship become disabled on the voyage. Indeed if the ship be not sea-worthy at the outset, and the voy age be discontinued on that account, a seaman is not entitled to *wages*, though perhaps he may maintain a special action against the owner for the recovery of damages (*b*). (1) It was mentioned in a preceding chapter that the payment of wages is divisible, and that if a ship has delivered its cargo at one place, the wages are so far due, although the ship be afterwards taken or sunk. But if a ship sail to one place in order to take in a cargo there, to be conveyed to another place, and having received the cargo accordingly, be taken before its arrival at the place of delivery, nothing is payable to the seamen for navigating the ship to the first place, because no freight is thereby gained (*c*). (2)

2. I have mentioned in a former part of this treatise (*d*), that in some foreign countries, where ransom is not contrary to law, the seamen belonging to a ship

(*b*) By *Lord Ellenborough*, Ch. J. *Eaken v. Thom.* 5 Espin N. P. cases, 6.

(*c*) *Hernaman v. Bawden*, 3 Burr. 1844, on a voyage to *Newfoundland* for fish to be carried to *Spain*.

(*d*) *Ante*, part iii. chap. viii. s. 14

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(1) This doctrine is doubted in Hoyt v. Wildfire, 3 John. Rep. 518.; and seems overruled by Judge Peters, in Hindman v. Shaw, 2 Peters. Adm. Rep. 264., where in a case of unseaworthiness in the course of the voyage, he decreed wages up to the time when the mariner, who refused to go on in another vessel, left the ship. But he seemed to think that if the unseaworthiness had existed at the *beginning* of the voyage, the merchant would be a delinquent, and the seaman might claim wages as in the common case of a voyage broken up by the fault of the owner.

(2) But see on this point the note under p. 441.

captured and ransomed, are bound to contribute a portion of their wages toward the ransom by way of general average. This point is in itself of no importance in this country, because ransom is prohibited by our law; but the payment of salvage upon re- [445] capture is analogous to the payment of ransom, and was so considered by *Sir Wm. Scott* in a late case in the Court of Admiralty (*e*). In an action brought for the wages of a seaman after a capture and ransom of the ship, and which was tried before *Chief Justice Holt*, the Chief Justice is reported to have decided that the seaman was entitled to nothing, he being unable to *prove* that by the custom of merchants he was entitled *pro ratâ*, as was insisted on his behalf (*f*).

2. *b.* But it seems to be the better opinion, that in the case of capture and recapture, if the ship perform her voyage and earn her freight, a mariner who has not been separated from her, is entitled to his wages upon the footing of the original contract (*g*), subject perhaps to a proportionate salvage. In conformity to this opinion, at the trial of a cause before *Lord Eldon*, when his Lordship presided in the Court of Common Pleas, a seaman recovered his whole wages af- [446] ter capture and recapture of the ship (*h*). The

(*e*) The Friends, *Bell*, 4 Rob. A. R 143. The prize acts do not mention the *freight*; they only direct a portion of the value *of the ships, vessels, boats and goods restored*, to be paid as salvage. But as the goods, if taken to the place of destination, are valued *there*, the freight is of course included in the valuation, and so the freighter may pay salvage upon it; in one case, an *eighth* of the freight was ordered to be deducted as between the owner and freighter. The Race Horse, *White*, 3 Rob. A. R. 101.

(*f*) *Chandler v. Meade*, mentioned at the end of the case of *Wiggins v. Ingleton*, 2 Ld. Raym. 1211.

(*g*) *Molloy*, book 2. ch. 4. sect. 14. as to *freight* which depends upon the same principle. But see the dictum of *Eyre*, C. J. in *Curling v. Long* 1 Bos. & Pul. 637. which is contrary.

(*h*) *Bergstrom v. Mills*, 3 Esp. N. P. Cases, 36.

owners did not insist upon any deduction as contribution to the salvage, but put their defence on another ground, which they failed to establish. In another case, a mariner, who had been hired for a voyage from *Newcastle* to *London* and back, at a certain sum, and was captured on board two days after the ship's departure, and taken out and sent to *France*, instituted a suit in the Court of Admiralty for wages; the ship had been retaken, carried to the place of destination and performed her voyage; the owner however had been obliged to hire another person at *London* to return to *Newcastle* with the ship, in the place of the plaintiff. Under these circumstances the learned Judge of that Court held, that the plaintiff was not entitled to any thing; but it seems from the language of the report, that if the plaintiff had remained on board, his interest would have been thought to have revived upon the recapture (*i*). (1)

(*i*) The Friends, *Bell*, 4 Rob. A. R. 143.

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(1) This case in Robinson's Reports seems contradicted as *to the general principle* by the case of Bergstrom v. Mills, 3 Esp. N. P. Cas. 36., (which was approved by the Court in Beale v. Thompson, 4 East. Rep., 560.) and was denied on mariner's shipping for *monthly wages* in the following case. The plaintiff was a mariner shipped for *monthly wages* on board the ship Ariadne, on a voyage from Boston to Charleston, S. C. and thence to London, and thence to her port of discharge in the United States. The ship sailed to Charleston in ballast, took in a cargo on freight, and on her passage to London was taken by a French privateer, carried in and after a detention of eight months released. The ship then sailed for London and there delivered her cargo and received full freight money. The plaintiff at the time of capture was taken out of the ship, carried as a prisoner to France, and after two months was released, and

In a case tried before the late *Lord Kenyon*, the master of a vessel, which had been seized and restored, claimed his wages for the period of detention, although during that time he had been separated from her; she having afterwards earned her freight. The wages for the voyage exclusive of that period, were paid without dispute; and the defendant is reported [447] to have acquiesced under a verdict given against him for the further sum, by reason of a strong opinion expressed by his Lordship at the trial in favor of the claim (*k*). (2)

(*k*) *Pratt v. Cuff*, cited in *Thompson v. Rowcroft*, 4 East. 43.

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as soon as he could, took passage for Boston where he arrived in about two months after his release. The court were of opinion that the plaintiff was entitled to recover his wages *up to the time of his arrival in Boston*, he not having earned any in the meantime in any other employment. They considered that capture did not extinguish the contract for wages, unless followed by condemnation. That the case in 4 Robinson's Reports, 143., The Friends was distinguishable, as the seaman there was hired *by the run*. Brooks v. Dorr & another, 2 Mass. Term Rep. 39.

(2) In Hart v. Ship Little John, 1 Peters. Adm. Rep. 115., an American Ship delivered her cargo at Liverpool, and on her return to the United States, was captured by a French privateer, and afterwards recaptured by an English Frigate and restored on payment of salvage, and completed her voyage. The libellant, a mariner, having been taken out of the ship, was carried to France and there released. Judge Peters decreed him full wages for the whole voyage of the ship, deducting a proportion of salvage. The same learned Judge decided in the same way the case of Howland v. Brig Lavinia, 1 Peters. Adm. Rep. 123. And he distinguishes the case of a neutral seaman from that of

The ground of decision in this case, was fully discussed and considered, on the occasion of the seizure

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a belligerent seaman, which was the case of The Friends, 4 Rob. Adm. Rep. 143.

In another recent case, where a mariner had been taken from a captured ship, and the ship was sent to Cumana and there released; and afterwards performed her voyage, the same Judge decreed wages to him for the whole voyage, deducting whatever wages he had earned after the separation. On appeal the Circuit Court affirmed the decree. Singstrom v. Schooner Hazard, 2 Peters. Adm. Rep. 384.

But where in such a case the seaman might after his release have rejoined the ship, wages were decreed only to the time when he might have so rejoined her. Boardman v. Brig Elizabeth, 1 Peters. Adm. Rep. 128.

And condemnation does not defeat the claim for wages for a former part of the voyage in which freight has been earned. id. ibid.

In cases of capture seamen are bound to remain with the ship until a first adjudication is had, but not longer, even though an appeal be entered. A voluntary abandonment of their duty in this respect amounts to desertion and forfeiture of wages. But if prevented by the captors from remaining on board, or if they are without the means of subsistence, or are discharged by the master, they are not chargeable with any default. They are entitled to wages during the time they remain with the ship, and the master is bound to furnish them with subsistence. id. ibid.

Where a ship is abandoned at sea as a wreck, no freight is earned and of course no wages due. The abandonment produces a dissolution of the contract, and the mariners are discharged from the ship. If they save any thing they become entitled to a compensation as salvors. Dunnett v. Tomhagen, 3 John. Rep. 154. Mason v. Ship Blaireau, 2 Cranch. Rep. 240.

and detention of several *British* ships in *Russia*, by the late Emperor *Paul*, in the year 1800. I allude to the case of *Beale v. Thompson*, which has been incidentally mentioned before. *Beale* an *Englishman*, was hired to serve as a seaman in a *British* ship, called the *Acquilon*, whereof *Thompson* was owner, at *monthly* wages for a voyage from *Hull* to *Petersburgh*, and from thence to *London;* and signed articles in the usual form. The ship went out to *Petersburgh* in ballast to bring a cargo to *London;* and the freight was to be paid *by the ton*. On the *fifth* of *November* 1800, which was soon after this vessel arrived at *Petersburgh*, the Emperor commanded an embargo to be laid on all *English* ships in the ports of his empire, until a supposed convention relating to the island of *Malta* should be fulfilled. To enforce this order, guards were stationed along the shore to prevent the crews from quitting their ships. On the *tenth* of the same month, they were taken from their ships by a *Russian* guard; such of the seamen as were subjects of other countries were liberated at the request of their Consuls; but the *British* masters and mariners were marched in parties in- [448] to the interior of the country, and treated as prisoners of war. A convention hostile to *Great Britain* was formed between *Russia*, *Sweden*, and *Denmark*, and an embargo was imposed in this country on the vessels of those nations. Upon the death of *Paul*, and the succession of the present Emperor *Alexander*, peace was re-established, and the ships that had been detained on both sides were mutually restored. This restitution took place in *Russia* at the end of *May* 1801. *Beale* and the rest of the crew, re-embarked on board the *Acquilon*, without entering into any new articles with

the master, and returned to *London* with the ship, which brought her cargo and earned her freight. *Thompson*, the owner, paid the wages at the rate mentioned in the articles, exclusive of the time of the ship's detention: and *Beale* brought his action to recover his wages for that time. In support of the claim it was contended, that this conduct of the *Russian* government, partook more of the nature of an embargo than of a capture, and that considering it is an embargo, the original contract for wages subsisted, as had been decided in the case of a contract of affreightment (*l*). And that the mariner's absence from the ship under these circumstances, did not occasion a forfeiture by the operation of those clauses of the articles, which provide for the continuance of the seamen on board their ship, [449] because, it was involuntary on his part. On the other hand, it was insisted, that this was a case of hostile seizure and temporary capture, which put an end to the original contract, and left the mariner a right, proportionate only to the services that he had actually performed. And further, that if it were to be considered only as an embargo, yet as the seaman had not during the period of it, done any duty on board the ship, or for the benefit of the owners, he was not entitled to any payment; and it was urged, that if the force of the Russian government furnished an excuse to the mariner on the one hand, for not performing his contract by continuing on board the ship, so on the other hand it ought to exempt the owner from paying for what he had not received. The learned Judges of the Court of *Common Pleas*, were divided in opinion as to the character to be attributed to these acts of the Rus-

(*l*) See before, part 3. ch. 11. sect. 4.

sian government, upon which the determination of the question between the parties was thought principally to depend (*m*). The cause was brought before the Court of *King's Bench* by writ of error, and after consideration, the judgment of the Court was delivered by *Lord Ellenborough*, in favour of the claim of *Beale* the mariner. It is impossible to give the full effect of the very learned judgment pronounced by the Chief Justice in an abstract, nor does the plan of this treatise allow me to transcribe the whole, I must therefore refer the reader, who is desirous of full information, to [450] the report (*n*), and content myself with stating, that the Court thought it unnecessary to decide in this case, whether or no the dissolution of contracts for freight and wages, is the necessary effect of perfect and complete capture, where the right of the original proprietor is not revested by subsequent recapture, nor recognized as continuing in force by any judgment or authoritative act of restitution on the part of the capturing nation; considering this as a case of hostile seizure, with a view to measures of retaliation, if they should ultimately be thought just and necessary, but of subsequent restitution and abandonment of the right of seizure, on the part of the power by which the seizure had been made; and observing that there was no case where property so dealt with had been considered as captured, or the contract for freight or wages dissolved: and holding therefore that the plaintiff's claim was not defeated on the supposed ground of a dissolution of the contract. The Court also thought, that the seaman had not in this case forfeited his wages under any of the

(*m*) *Beale v. Thompson*, 3 *Bos.* & Pull. 405.

(*n*) *Beale v. Thompson*, 4 East. 546.

clauses of the articles, because the language of the articles construed, as it ought to be, with reference to the acts of parliament, imported a departure from the ship by the unauthorized act of the party, and did not apply to a seaman taken out of his ship in the manner, in which the plaintiff and the rest of the crew had [451] been in this case; but that if this point were more questionable than it appeared to be, yet that the return of the plaintiff to the ship in the manner stated, did, in the absence of any fresh contract on the subject, import a recognition on the part of the master, that he and the sailors then stood in their original relative situation to each other, under the articles, by which that relation was constituted. And upon the whole the Court thought, "in point of law, that the contract of "service, between the plaintiff and defendant, was to be "considered as having continued and been in force "from the time of executing the articles, up to and at "the period of the ship's arrival at her port of discharge, "and the final termination of her voyage there; and "that the plaintiff was to be considered as entitled to "his wages during the same time."

It has been observed that *Beale* the plaintiff in the case just quoted, was *an Englishman;* an action was also brought by a mariner, belonging to another ship, under circumstances the same in all respects except as to his national character, he being *a foreigner*. In this action also the decision of the Court was the same (*o*).

SECONDLY, as to the *forfeiture* of wages.

3. Desertion from the ship is held to be a forfeiture of the wages previously earned in all maritime

(*o*) *Johnson v. Broderick*, 4. East. 566.

states (*p*). (1) And in conformity to this principle of maritime law, the legislature of this [452] country in the reign of *King William the Third* "for the prevention of seamen deserting of merchants' "ships abroad in parts beyond the seas," enacted, "That all *such* seamen, officers, or sailors, who shall "desert the ships or vessels, wherein they are hired to "serve for that voyage, shall for such offence forfeit all "such wages, as shall be then due to him or them." (*q*). By the subsequent statute, which I have so often quoted, if a seaman shall desert, or refuse to proceed on the voyage on board any ship bound to parts beyond the seas, or shall desert from the ship, to which he belongs, *in parts beyond the seas*, after he shall have signed the contract, he shall forfeit to the owners the wages due to him, at the time of his deserting or refusing to proceed on the voyage (*r*).

(*p*) See on this subject of desertion, Ordin. of *Wisbuy*, art. 61. of the *Hanse-towns*, art. 43. *Molloy*, book 2. chap. 3. sect. 10. *French* Ordinance, liv. 2. tit. 7. *Des Matelots*, art. 3.

(*q*) 11 & 12 *Will.* 3. *c.* 7. *s.* 17.

(*r*) 2 *Geo.* 2. *c.* 36. *s.* 3.

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(1) But every quitting of the ship is not desertion; if it be done for a justifiable cause the mariner shall have his wages. Where a ship had been taken and brought into port, and the seamen went on shore, and on being required to go on board again, said that they had no victuals for the day, and only requested to stay till they had some; and being left on shore, returned the next morning, and the master then refused to receive them. Lord Eldon was of opinion that the conduct of the seamen did not amount to desertion: that their request was reasonable: that they had no intention of abandoning the ship, and that therefore the master should not be entitled to consider their refusal to go on board as desertion. Sigard v. Roberts, 3 Esp. N. P. C. 71.

In the case of certain mariners hired in *the Downs*, for a voyage or run to the port of *Hull* at *twelve* guineas each, who with the consent of the master, but against the positive orders of the owners, quitted the

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So in an action brought by the mate of a Swedish Ship against the captain for wages, it appeared that the plaintiff shipped for a voyage from Stockholm and back again, and that by one of the articles the captain was obliged under a penalty to bring back the crew to Sweden. During the voyage the captain beat the plaintiff several times, and degraded him to the situation of a common sailor before the mast, and the plaintiff at length quitted the ship. Lord Kenyon was of opinion that upon the facts of the case the plaintiff had not deserted, and said, "There are reciprocal duties between master and servant. From the servant is due obedience and respect; from the master protection and good treatment. Desertion is a forfeiture of wages; but if the captain conducts himself in such a way as puts the sailor into that situation, that he cannot without damage to his personal safety continue in his service, human nature speaks the language that the servant has a right to provide for his own safety. Desertion must be a voluntary act of the sailor, and not caused by any act of the captain. And in the present case the captain has made the dissolution of the contract necessary, and justifiable on the part of the plaintiff. Limland v. Stephens, 3 Esp. N. P. Cas. 269. See also to the same purpose, Hulle v. Heightman, 5 East. Rep. 145.

And where a ship was cast away in a perilous situation, and wholly incapable of pursuing the voyage, and the seamen quitted the ship without leave, and were arrested and imprisoned. Judge Peters held that by the misfortune the voyage was broken up, and the conduct of the mariners was not desertion; and discharged them from imprisonment. Sims v. Mariners of the Ship Woodrop Sims, 2 Peters. Adm. Rep. 393.

ship on the day after her arrival in the roadsted of that port, in the river *Humber*, the port being so full, that the vessel could not enter immediately; the present learned Judge of the Court of Admiralty, decreed that the mariners had forfeited their wages. The ship actually entered the port within a week: [453] it did not appear that at the time of the desertion, there was any prospect of a *lasting* impediment: and the learned Judge, without determining how long mariners were bound to wait in such a case, held, that they could not be entitled to their dismissal, "till after "some time of just expectation of the removal of the "difficulty" (*s*).

By the articles of agreement usually signed in these cases, it is stipulated that the mariner shall not go out of the ship on board any other vessel, or be on shore under any pretence whatever, without leave, and that in default he shall be liable to the penalties of this act of parliament (*t*): but this stipulation is merely referrable to the statute, and does not create a forfeiture of wages in a case where the statute has not inflicted it; as in the case of leaving the ship after her arrival at her port of discharge in this country, although before she is moored (*u*). This case is specifically provided for by another section of the same statute which, reciting that "seamen and mariners after their ship's arrival at their "unlivering *port* in *Great Britain* oftimes leave the "ships and vessels, before they are unladen, or before "the said seamen and mariners are discharged by the "masters or commanders of such ships or vessels," enacts, "that in case any seaman or mariner, not en-

(*s*) The PEARL, *Denton*, 5 Rob. A. R, 224.

(*t*) *Appendix*, No. V.

(*u*) *Frontine v. Frost*, 3 Bos. & Pull. 302.

"tering into the service of his Majesty, his heirs and "successors, shall leave such ship or vessel to [454] "which he or they belong, before he or they "shall have a discharge in writing from the "master or commander, or other person having the "charge of such ship or vessel, he or they so leaving "such ship or vessel shall forfeit *one month's* pay" to the use of *Greenwich Hospital* (*x*). Although by this clause the discharge is required to be in writing, yet in an action brought by a seaman against the master for his wages, at the trial whereof it appeared that the plaintiff and several others left the ship under these circumstances, while she was under the command of the mate, and the master insisted upon his right to make this deduction, but did not call the mate to prove that he had not given a discharge in writing; it was held that the Jury might presume that the plaintiff had received such a discharge; this being the case of a penalty, in which the negative ought to be proved by the party insisting on the forfeiture, as the circumstances of the case appeared to afford him the means of doing so (*y*).

The same statute authorizes the master or owner to deduct from the wages due to a mariner all the penalties and forfeitures incurred by the act, and to enter them in a book to be kept for that purpose, to be signed by the master and two or more principal officers (*z*): and it has been held that the master cannot make this deduction unless the forfeiture has been regularly entered in a book as the statute directs (*a*).

With respect to ships of the burthen of one hundred tons and upwards, employed in the *coasting trade* and

(*x*) 2 *Geo.* 2. *c.* 36. sect. 6.
(*y*) *Frontine v. Frost.* 3 Bos. & Pull. 302.
(*z*) 2 *Geo.* 2. *c.* 36. *s.* 9.
(*a*) *Frontine v. Frost.* 3 Bos. & Pull. 302.

going to open sea; if a seaman, having signed the requisite agreement, neglects or refuses to proceed on the intended voyage, he forfeits to the owners *all* the wages due to him at the time; but the forfeiture for desertion afterwards, and before the voyage or voyages agreed upon, or upon which such ship shall have proceeded, shall be completed, and the cargo of such ship delivered, or before the seamen shall have a discharge in writing from the master, &c. is only of *one month's* wages to the use of *Greenwich-Hospital* (*b*).

In *all* cases a seaman, who *wilfully* absents himself from the ship without leave, forfeits to the use of *Greenwich Hospital, two days* pay for each day's absence (*c*). Absence occasioned by the power of a foreign country, in which the ship may happen to be, without any fault on the part of the seaman, does not work any forfeiture (*d*).

In the coasting trade, the statute directs, that if a seaman is hired by the voyage, and the period of the voyage agreed upon exceeds one *lunar* month, the forfeiture of one month's pay shall be accounted [456] a forfeiture of a sum of money bearing the same proportion to the whole wages, as a lunar month shall bear to the whole period of the voyage; and that the forfeiture of two days pay shall be computed in the same manner. If the whole period of the voyage does not exceed one lunar month, the forfeiture of one month's pay is to be accounted a forfeiture of the whole wages contracted for: and the like as to the forfeiture of two days pay, if the voyage does not exceed two days (*e*).

(*b*) 31 *Geo.* 3. *c.* 39. *sect.* 3 & 4.
(*c*) 2 *Geo.* 2. *c.* 36. *s.* 5. & 31 *Geo.* 3. *c.* 39. *s.* 4.
(*d*) *Beale v. Thompson.* 4 East. 546.
(*e*) 31 *Geo.* 3. *c.* 39. *s.* 9.

In addition to this forfeiture of wages earned by service in the ship, from which a seaman deserts, the legislature has further punished desertion from a *British* ship in the *West-Indies*, with forfeiture of *all* the wages, to which he might otherwise be entitled for the voyage made in the ship, *on board of which he shall enter* immediately after such desertion (*f*).

I have already mentioned that entry into the service of his Majesty is *not* deemed a desertion, nor followed by the forfeiture of wages (*g*). (1)

(*f*) 37 *Geo.* 3. *c.* 73. *s.* 1.

(*g*) Chap. 2. of this part, sect. 2. by the statute there cited.

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(1) The act of Congress, 20. July, 1790. ch. 29. (1 U. S. L. 134.,) sect. 2. provides, "that at the foot of every such contract "there shall be a memorandum in writing of the day and hour "on which such seaman or mariner, who shall so ship and subscribe, shall render themselves on board to begin the voyage "agreed on. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which "he has shipped at the time mentioned in such memorandum "and if the master, commander, or other officer of the ship or "vessel, shall, on the day on which such neglect happened, "make an entry in the log-book of such ship or vessel, of the "name of such seaman or mariner, and shall in like manner "note the time that he so neglected to render himself after the "time appointed, every such seaman or mariner shall forfeit for "every hour, which he shall so neglect to render himself, one "day's pay according to the rate of wages agreed upon, to be "deducted out of his wages. And if any such seaman or mariner shall wholly neglect to render himself on board of such "ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed "to sea without him, every such seaman or mariner shall for-

4. The legislature has also punished with the forfeiture of wages the offence of neglecting or refusing to

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" feit and pay to the master, owner, or consignee of the said " ship or vessel, a sum equal to that which shall have been paid " to him by advance at the time of signing the contract, over " and besides the sum so advanced." And sect. 5. provides " that if any seaman or mariner, who shall have subscribed such " contract as is herein before described, shall absent himself " from on board the ship or vessel, in which he shall so have " shipped without leave of the master or officer commanding " on board, and the mate or other officer having charge of the " log, shall make an entry therein of the name of such " seaman on the day on which he shall so absent himself, and " if such seaman or mariner shall return to his duty within for- " ty eight hours, such seaman or mariner shall forfeit three " day's pay for every day, which he shall so absent himself, to " be deducted out of his wages; but if any seaman or mariner " shall absent himself for more than forty eight hours at one " time, he shall forfeit all the wages due to him, and *all his* " *goods and chattels which were on board the said ship or vessel, or* " *in any store where they may have been lodged at the time of his* " *desertion* to the use of the owners of the ship or vessel, and " moreover shall pay to him or them all damages," &c. &c.— On these two clauses a decision has been recently made in Massachusetts. The mariner after having shipped did not render himself on board, and the ship proceeded to sea without him. It was contended that both clauses were in pari materia and merely cumulative, and that therefore such desertion occasioned a forfeiture of all the goods and chattels of the mariner on board the ship. But the court held that the first section applied exclusively to absence and desertion *in the port of departure*; and the last section exclusively to absence and desertion in the

assist the master in defending the ship against the attack of pirates (*h*). It seems also that neglect of duty,

(*h*) 22 & 23 Car. 2. *c.* 11. *s.* 7.

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course of the voyage *at any other port.* Cotel v. Hilliard, Essex, November Term, S. J. C., A. D. 1808. MSS.

The entry in the log-book of the absence or desertion is indispensable. If an absence is entered, it must be also stated whether *with or without leave;* stating that the seaman left the ship is not sufficient: and no parole evidence can be admitted to prove the desertion. It must be proved by an entry at the time by the proper officer. Lord v. Kimball, Essex, April Term, S. J. C., A. D. 1804. Cor. Dana, C. J. and Strong J. MSS. So in Malone v. Brig Mary, 1 Peters. Adm. Rep. 139., Judge Peters said, that he always considered the entry in the log-book evidence of the fact of desertion, *but not conclusive, though indispensably necessary.* S. P. Whitton v. Brig Commerce. id. 160. Jones v. Brig Phœnix, id. 201. Thompson v. Ship Philadelphia. id. 210.

But even if the seaman has been absent more than forty eight hours and has deserted, the forfeiture of his wages is remitted by receiving him again on board. It operates as a release. Whitton v. Brig Commerce above cited. This seems consonant with the rule of the common law, that where a servant is hired by the year and deserts, and he returns and is received by his master, he shall be entitled to his wages. As Lord Hardwicke said, "it is always esteemed a dispensation and works in the nature of a remitter." Castlehunt v. Syford, 1 Burr. Sett. Cas. 68. This is the general rule, but where a mariner has neglected to render himself on board at the time appointed according to the provisions of sect. 2. above quoted, the receiving him on board is not a release of the penalty. This is an exception from the

disobedience of orders, habitual drunkennesss, or any cause, which will justify a master in dis- [457] charging a seaman during the voyage, will also deprive the seaman of his wages (*i*). (2)

(*i*) See the judgment pronounced by *Sir William Scott*, in the case of *Robinet v. The ship* EXETER 2 Rob. A. R. 261.

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very nature of that section, for otherwise it would be nugatory. Malone v. Brig Mary, above cited.

The wages which are forfeited by desertion, are the wages which are already earned ; but the wages for the section of the voyage unfinished are not included, they not being earned until the ship arrives at her port of delivery. Whitton v. Brig Commerce, note under page 162.

(2) This seems to be universally recognized as the marine law. But although the seamen conduct improperly, yet by the marine law, their offences so far as they affect contracts are pardoned on repentance, compensation or offer of amends and return to duty.—Public policy and private justice as it is fit they should, here move together. To this effect are Art. 25. of laws of Wisbuy., and art. 13. of laws of Oleron. Atkins v. Burrows, 1 Peters. Adm. Rep. 244. Whitton v. Brig Commerce, 1 Peters. Adm. Rep. 160. in case of *desertion*. Thorne v. White. id. 168. in case of an *assault and battery* of the master,—and Black v. Ship Louisiana. id. 263. in case of *gross neglect*. Relf v. Ship Maria. id. 136. in case of *mutinous and rebellious conduct*. Dixon v. Ship Cyrus, 2 Peters. Adm. Rep. 407. in case of *disobedience*. And Judge Davis, in a recent case in Massachusetts where the libellants had been *convicted* of an "*endeavour to make a revolt*," (1 U. S. L. 100. ch. 9. sect. 12.) held that a promise of forgiveness of the master, restored the mariners to their wages. Johnson & others v. Ship Eliza, November, A. D. 1807. MSS.

5. If the cargo be embezzled or injured by the fraud or negligence of the seamen, so that the merchant has a right to claim a satisfaction from the master and owners, they may by the custom of merchants deduct the value thereof from the wages of the seamen, by whose misconduct the injury has taken place (*k*). And the last proviso introduced into the usual agreement (*l*) signed by the seamen, is calculated to enforce this rule in the case of embezzlement either of the cargo, or of the ship's stores. This proviso however is to be construed individually, as affecting only the particular persons guilty of the embezzlement, and not the whole crew (*m*). Nor, as it seems, is any innocent person liable to contribute a portion of his wages to make good the loss occasioned by the misconduct of others (*n*). (2)

(*k*) *Molloy*, book 2. chap. 3. sect. 9. 2 Show. 167. 1 Ld. Raym. 650.
(*l*) See *Appendix*, No. V.
(*m*) *Thompson v. Collins*, 1 Bos. & Pull. N. R. 347.
(*n*) The same case.

The same doctrine seems supported by the opinion of the court in Beale v. Thompson, 4 East. 546. See also The King v. Castlechurch, 1 Burr. Sett. Cas. 70. and The King v. Eaton. id. 48.

If a person be hired as a mate, and from incapacity or ill conduct, be disgraced to the mast, a deduction of his wages will be allowed by the Court of Admiralty, Mitchill v. Ship Orozembo, 1 Peters. Adm. Rep. 250.

(2) In Lewis v. Davis, 3 John. Rep. 17., where goods had been stolen in the night time from a ship, the crew being then on shore by leave from the commanding officer, the court were of opinion that the crew were not bound to contribute to the loss. Chief Justice Kent in delivering the opinion of the court said, "admitting the rule of the maritime law to be that mariners are

to contribute out of their wages to the damages arising from embezzlements by each other during the voyage, yet if negligence be not imputable to them, and the circumstances of the case do not fix the presumption of embezzlement upon any of the crew, they ought not to contribute. Molloy does not state the rule on this subject with much precision, nor is he of much authority; but he rather seems to place it on the ground of fault or negligence; and even the limited extent to which he carries it in this instance, has been recently questioned or denied by the court in Thompson v. Collins, (1 New Rep. 347.) On the other hand the mutual responsibility of seamen has been carried to a greater extent in the decrees of the District Court of Pennsylvania (1 Peters. Adm. Rep. 243.) and further, I apprehend, than in any of the marine ordinances annexed to the reports of those respectable decisions."

In Crammer v. Ship Fair American, alluded to in the above case, Judge Peters held that where embezzlement is fixed on some of the crew; yet all are bound to contribute; and that no one is to be excused from this general contribution, though absent from the ship, and not in a situation to be capable of assisting in the plunder. See also —— v. Ship Kensington, 1 Peters. Adm. Rep. 239. Knap v. Brig Eliza and Sarah. id. 200.

However in a case of embezzlement *where it could not be ascertained by whom or when committed*, Judge Davis decided that all the seamen were liable to contribute to the plunderage so far as it comprehended property of the owners, but not of the master. An appeal was entered, but the decision was finally acquiesced in. Bradish v. Ship Friendship, September, A. D. 1804. District Court, Massachusetts, MSS.

It seems also that the admiralty courts will deduct from the seaman's wages all contributions for casks stove by negligence, and all other damages sustained by their misconduct. Wilson v. Belvidere, 1 Peters. Adm. Rep. 288. Thorne v. White. id. 168. But the owner cannot retain the wages to answer contingent damages. —— v. Ship Washington. id. 219.

CHAPTER THE FOURTH.

OF PROCEEDINGS TO OBTAIN THE PAYMENT OF WAGES.

HAVING, in the three preceding chapters, considered the contract for service on board a mer-
[458] chant ship; the cases, in which the remuneration of such service is due either wholly or in part; and those, in which it is lost, or forfeited; I propose in this last chapter to treat of the means of obtaining this remuneration by legal process.

1. According to the observation made in a former part of this treatise (*a*), the jurisdiction of the Courts of Common law can in this case be exercised only by suit against the person; but the jurisdiction of the Court of Admiralty may be exercised by process against the ship. In this Court alone therefore that principle of the maritime law, which holds the ship in specie to be subject to the claim of wages earned by service in it, can be carried into effect. The Court of Admiralty was originally constituted for the adjudication of causes and disputes arising upon the high sea, and within the jurisdiction of the Lord High Admiral, whose deputy the Judge of that Court formerly was. The proceedings therein, being according to the course of the Civil Law, appear to have been very unpopular in ancient times; and two statutes were made in the reign of *King Richard the Second*, upon the complaint of the Commons of

(*a*) Part 2. ch. 3. sect. 25.

England, to define the limits of its jurisdiction; by the first of which it is "accorded and assented, that the "admirals and their deputies shall not meddle from "henceforth of any thing done within the realm, but "only of a thing done upon the sea, as it hath "been used in the time of the noble prince [459] "*King Edward* grandfather of our Lord the "King that now is:" (*b*) by the other, "It is *declared*, "ordained and established, that of all manner of con-"tracts, pleas, and quarrels, and all other things, aris-"ing within the bodies of counties, as well by land as "by water, and also of wreck of the sea, the Admiral's "Court shall have no manner of cognizance, power, "nor jurisdiction" (*c*). Considering these statutes with reference to the present subject, it is evident that, if the seaman's claim to wages be in reality founded on the performance of his service in the navigation of a ship on the high sea, the Court of Admiralty must have cognizance of the claim; and on the other hand that, if the claim be in reality founded on the contract made for performance of such service, and such contract be, as it usually is, made on shore, or in a port or river, within the body of a county, the Court of Admiralty can have no cognizance of it. In this view of the subject, it is difficult to distinguish the case of the master from that of the persons employed under his command; the nature and place of the service, and the place of the hiring, are in both cases usually the same. Nevertheless a distinction has long been made between them, and is now become a settled rule of law. In pursuance of this distinction the seamen have now in ordinary cases a three-

(*b*) 13 Rich. 2. st. 1. c. 5. (*c*) 15 Rich. 2. c. 3.

fold remedy, against the ship, the owners, and [460] the master; the master, whether appointed to that office at the commencement (*d*), or succeeding to it in the course (*e*), of the voyage, can only sue the owners personally in a Court of Common Law (1). But as he generally receives the freight and earnings of the ship, and may pay himself out of the money in his hands, he has not often occasion for the aid of a Court of Justice to obtain his right. The suit of the seamen in the Court of Admiralty is frequently spoken of as an excepted case (*f*), and an indulgence granted to them on account of the convenience and advantage of proceeding in a Court, in which all may join in one suit, and payment may be obtained out of the value of the ship; and of the presumption that they, who contract with the master, contract with him on the credit of the ship: whereas the master, who contracts with the owners, is presumed to trust to their personal credit (2).

(*d*) *Ragg v. King*, 2 Stra. 858. 1 Bernard: 297. and *King v. Player*, there cited. *Clay v. Sudgrave*, or, *Snellgrave*, Salk. 33. 1 Ld. Raym. 576. 12 Mod. 405. Carth. 518.

(*e*) *Read v. Chapman*, 2 Stra. 937. *The* FAVOURITE, *De Jersey*, 2 Rob. A. R. 232.

(*f*) In the cases cited in the two last notes.

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(1) So held in Montgomery v. Henry, 1 Dall. Rep. 49. See Gardner v. Ship Jersey, as to what sums will be paid out of remnants and surplusses in the Courts of Admiralty, 1 Peters Adm. Rep. 223. See also as to the right of the master to sue in the Admiralty, 2 Brown. Civ. and Adm. Law. 95.

(2) The Constitution of the United States has expressly delegated to the Courts of the United States, all causes of Admiralty and Maritime jurisdiction. The act of Congress, regulating seamen in the merchants' service, provides that the seamen may sue in the Admiralty Court for their wages. Act, 20. July,

2. The clear result of the several decisions (*g*) upon this subject is, that if the hiring be on the usual terms, and made by word, or by writing only [461] without seal, the seamen, or any one or more of them, and every officer except the master, may sue in the Court of Admiralty; and may by the process of that Court arrest the ship as a security for their demand, or cite the master or owners personally to answer to them.

And the seamen may sue there not only for the wages earned in the course of a voyage, but for those earned in rigging and fitting out a ship for a voyage, on which they have engaged to proceed, if the owners do not afterwards think proper to send the ship on the intended voyage (*h*). And it seems also that they may sue there for the wages contracted to be paid to them for navigating a ship from one port of this country to another (*i*). (1) And if a suit be there instituted, that Court can properly decide whether a place at which a

(*g*) As to the SEAMEN, *after* sentence, Winch. 8. *Before* sentence, *Alleson v. Marsh*, 2 Vent. 181. *Anon.* 8. Mod. 379. *Bens. v. Parre.* 2 Ld. Raym. 1206. The BOATSWAIN, *King v. Ragg.* 2 Stra. 858. 1 Barnard: 297. The CARPENTER, *Wheeler v. Thomson*, 1 Stra. 707. The SURGEON, *Sayer*, 136. The MATE, *Bayley v. Grant*, 1 Ld. Raym. 632. Salk. 33. *Read v. Chapman*, 2 Stra. 937.

(*h*) *Wells v. Osman*, 2 Ld. Raym. 1044. 6 Mod. 238. *See* also *Mills & another v. Gregory*, Sayer, 127.

(*i*) *Anon.* 1 Vent. 343. The application for a prohibition was *after* sentence. See 31 *Geo. 3. c.* 39. *s.* 6.

1790. ch. 29. (1 U. S. L. 134.) sect. 6. The same right or privilege is granted to fishermen employed in the fisheries of the United States. Act, 16. February, 1792. ch. 6. (2 U. S. L. 15.)

(1) The same point is decided in Ireland, Parry v. Peggy, 2 Brown's Civil and Adm. Law, Appendix, p. 533.

ship may have arrived be a port of delivery so as to entitle them to wages (*k*). Indeed if the master has obtained a sentence in the Court of Admiralty upon the usual allegation, stating that he was hired within the jurisdiction of that Court, the Courts at *Westminster Hall* will not prohibit the execution of the sentence (*l*).

3. I have said that seamen may sue in the Court [462] of Admiralty, if the contract is made on the usual terms and not by deed. It was decided in two causes, before the passing of the earliest statute requiring the contract to be in writing, that the Court of Admiralty had jurisdiction in the case of a written contract (*m*). And as well the statute requiring a written agreement in the case of foreign voyages (*n*), as that which requires such an agreement in the case of certain vessels employed in the coasting trade (*o*), contains a clause, enacting that no seaman shall, by entering into or signing such agreement, be deprived of any means for the recovery of wages against any ship, the master, or owners, which he might then lawfully make use of. The case of special agreements, and of contracts under seal, requires further explanation. The contract, whatever be its form or nature, always remains in the possession of the master or owners; the statutes expressly ordain that where it becomes necessary to produce the contract in Court, no obligation shall lie on the seamen to produce it, but on the master or owners of the ship, and that no seaman shall fail in any suit or process for the recovery of wages for want of the production of

(*k*) *Brown v. Benn & others*, 2 Ld. Raym. 1247.
(*l*) *Barber & another v. Wharton*, 2 Ld. Raym. 1452.
(*m*) *Bens v. Parre*, M. T. 4 Ann. 2 Ld. Raym, 1206, and the *Mariner's* Case, 8 Mod. 379.
(*n*) 2 *Geo.* 2. *c.* 36. *s.* 8.
(*o*) 31 *Geo.* 3. *c.* 39. s. 6.

it (*p*). In the common form of proceeding in the Court of Admiralty, the party, who sues for wages, does not state how the contract was made; the [463] foundation of the suit in that Court is the service and not the hiring; and therefore the objection that the hiring was upon special terms, or was made by deed, does not appear upon the face of the complainants' proceedings, but must be made by the defendants, if they wish to rely on it. And they must make their objection, and apply to one of the Courts at *Westminster Hall* for a prohibition, *before* sentence is given in the Court of Admiralty: if they suffer the cause to proceed to a judgment upon the merits in that Court, they cannot afterwards avail themselves of this objection (*q*). If the contract for service be made upon terms and conditions differing from the general rules of law, the service alone cannot entitle a seaman to his wages; his right to them must depend upon the performance of the stipulated terms. The construction of the instrument, in which those terms are contained, is a proper subject for the jurisdiction of the Courts of Common Law; and it is clear by the several authorities on this subject, notwithstanding a seeming dictum in one case (*r*) to the contrary, that upon the suggestion of such a contract made at land and under seal, supported by the proper affidavits, the Courts at *Westminster Hall* will [464] prohibit the Court of Admiralty from proceeding in a suit instituted there.

4. But it is not quite clear, whether the defendants

(*p*) 2 *Geo.* 2. & 31 *Geo.* 3. as last referred to.

(*q*) *Buggin v. Bennett*, 4 Burr. 2035. If a party, who has pleaded a modus to a suit in the Spiritual Court for tithes, suffer the modus to be tried in that Court, he cannot obtain a prohibition *after* sentence. *Full v. Hutchins*, Cowp. 422.

(*r*) *Bens v. Parre*, 2 Ld. Raym. 1206.

ought, before they apply for a prohibition, to plead the agreement in the Court of Admiralty as a bar to the jurisdiction of that Court. In one of the cases on this subject, the court of King's Bench is reported to have said, "If there is any special contract, as is now suggested, the defendant may plead it in the Court of Admiralty, and if that Court does not allow the plea, then it may be a proper time to move the King's Bench for a prohibition; for if it should be granted before the plea is disallowed, it is a prejudging of the justice of that Court"(*s*).

5. The course of the proceedings, that had taken place in the Court of Admiralty, does not appear by the report of any of the cases, in which a prohibition has been granted. The best reporter of the first of these cases (*t*), says only, "A motion was made for a prohibition to the Court of Admiralty, in a suit there for mariners' wages, upon a suggestion of a contract made for them at land; and the Court held, that for [465] the convenience of seamen the Admiralty had been allowed to hold plea for mariners' wages, but yet with this limitation, that if there be any special agreement, by which the mariners are to receive their wages in any other manner than is usual, or if the agreement be under seal, so as to be more than a parol agreement, in such a case a prohibition shall be granted: and so it was granted in this case."

In the second case (*u*), by the suggestion (*x*) made in

(*s*) The *Mariner's* Case, 8 Mod. 379. Trin. T. 11 Geo. 1.

(*t*) *Opy v. Child & others*, E. T. 5 Will. & Mary. K. B. Salk. 31. S.C. by the name of *Opy v. Addison & others*. 12 Mod. 38. but not more circumstantial.

(*u*) *Day v. Serle*, K. B. East. T. 7 *Geo.* 2. very shortly mentioned by *Strange*, vol. 2. p. 968. more fully by *Barnardiston*, vol. 2. p. 419; but the account in the text of the judgment pronounced by *Lord Hardwicke* is taken from a manuscript note.

(*x*) M. S. It is signed by *Draper*.

support of the motion for a prohibition, the defendant in the Court of Admiralty, after reciting the statutes relating to the jurisdiction of the Court of Admiralty, and the libel exhibited in that Court by the seamen (by which it appeared that they had during the voyage entered on board one of his Majesty's ships) set forth the contract, which contained an express covenant, that if any or either of the seamen should depart from or leave the ship during the voyage, to go on board any of his Majesty's ship or ships of war, or upon any other pretence or account whatsoever, without leave of the master, such seaman so deserting or leaving the ship should forfeit and lose all his wages and pay then due and owing; and averred that this contract was made on land in this country, and sealed and delivered by the parties, and that although he had offered to prove the [466] said statutes and the rest of the premises in the Court of Admiralty before the Judge there, yet that the Judge of the said Court had altogether refused to receive the said plea and allegation. Upon the motion for a prohibition, the Chief Justice (*Lord Hardwicke*) said, that before the making of the new statute (*viz.* the 2d *Geo.* 2. *c.* 36.) he always understood the law to be settled, that, as the Admiralty Court proceeds in suits for mariners' wages upon contracts made at land, which cannot be the proper cognizance of the maritime jurisdiction, merely by indulgence, a prohibition would always be granted where the contract differed from the common and usual contracts between masters of ships and seamen about wages, by reason of some special terms contained in it; and that in this agreement there seemed to be some special covenants, as for example, one that if the mariners should enter into any of his Majesty's ships of

war, they should forfeit their wages; which was directly contrary to a clause in the late act. And secondly, that where the agreement was by writing signed and sealed, there also a prohibition should go, which was likewise the present case. And the only question therefore remaining was, whether or no the statute reached to this case. And his Lordship gave his opinion that it did not; since as this was a contract by deed, it was dehors the act, which only required a contract in writing; and it could not be supposed that the act intended to give the Court of Admiralty the cognizance of [467] agreements for mariners' wages made by deed; that must depend upon the trial of the validity of such deed, which could not be otherwise than by a Jury at Common Law, being left as it was before; that this case came within the case of *Opy* and *Addison*, and as the late statute did not take it out of the old rule, it must still go by that rule. The other Judges concurred in the same opinion; and a prohibition was granted.

The report of the last case on this subject, which was a suit instituted in the Court of Admiralty by seamen employed on board a ship in the service of the *East-India* Company, is given at considerable length, and although the particulars of the deed, under which the seamen were hired, are not stated, it may be collected from the report that the deed contained a clause, by which it was stipulated, that the seamen should not be entitled to wages, unless the ship should return home; but it does not appear whether this event had taken place or no. The Court granted a prohibition upon the authority of the two former cases, and *Lord Mansfield* took notice that the seal was not the only circumstance,

in which this case differed from the ordinary contract for mariners' wages (*y*).

6. From this view of the decisions of the Courts at *Westminster Hall*, it appears that a [468] prohibition has not in any instance been actually granted where a contract was upon the ordinary terms, merely because it was made by deed; but that in each of the cases the Court considered that circumstance alone to be a sufficient ground for a prohibition. For which the reason seems to be, that as the suit of the seamen in the Court of Admiralty was at first allowed only as a matter of indulgence, and considered as an excepted case not properly belonging to the jurisdiction of that Court, the exception was confined to the case of ordinary contracts not made under seal. For if a contract under seal contain such clauses and covenants only as are conformable to the general rules, which govern the administration of justice in the Court of Admiralty, neither the actual existence, nor the legal effect and import, of the deed can become the subject of litigation in that Court. The seamen are not bound to make the deed the foundation of their claim, either by the general course of proceedings in the Court of Admiralty, or by the statute; and as it can never be their interest to deny the existence or execution of a deed pleaded by the defendant, containing only the usual terms, upon which their claim would rest, if such a deed did not exist the objection to the mode of trial pursued in that Court, and to the necessity of two witnesses to prove the execution of a deed, can hardly arise. In a case relating

(*y*) *Howe v. Nappier*, 4 Burr. 1944. The records of suggestions for prohibitions are in general very regularly kept at the office of the Clerk of the Papers, but the particular suggestion in this case could not be found, although a very diligent search was made by the officer.

to the jurisdiction of the Court of Admiralty on
[469] a deed of hypothecation of a ship by the master,
which came before the Court of King's Bench a few years ago, one of the learned Judges of that Court (*z*) said, "If the Court of Admiralty, *has jurisdiction* "*over the subject matter*, the circumstance of the instru- "ment being under seal does not deprive them of their "jurisdiction" (*a*).

7. In a case where the defendants in the Court of Admiralty pleaded a deed, by the terms whereof the mariners agreed to subject themselves to the loss of their wages on particular circumstances, and the plaintiff replied that the deed was obtained by fraud and circumvention, and the Court of Admiralty declared it to have been so, and gave sentence for the plaintiff to recover his wages; the Court of King's Bench, upon application for a prohibition, said, "This is only a deed on one "side to forfeit the wages upon particular circumstances, "but will not enable them to sue for their wages at law; "the deed therefore comes in only by way of incident, "and then they may proceed to try it. There can be "no prohibition" (*b*).

8. In proceeding against the ship in specie, if the value thereof be insufficient to discharge all the claims upon it; the seaman's claim for his wages is pre-
[470] ferred before all other charges (*c*), for the same reason that the last bottomry-bond is preferred to those of an earlier date: the labor of the seamen, having brought the ship to the destined port, has furnished to all other persons the means of asserting their

(*z*) Mr. Justice *Buller*, 3 Ter. Rep. K. B. 170.

(*a*) *Menetone v. Gibbons*, 3 Ter. Rep. K. B. 207.

(*b*) *Buck v. Atwood*, 2 Stra. 761.

(*c*) *The* FAVORITE, *De Jersey*, 2 Rob. A. R. 232. *French* Ordinance, liv. 1. tit. 14. *de la saisie des vaisseaux*, art. 16. and *Valin* thereon.

claims upon it, which otherwise they could not have had (1).

9. But all suits and actions brought in the Court of Admiralty for seamen's wages must be commenced within *six* years next after the cause of such suit or action shall accrue, unless the party entitled to sue shall at that time be within the age of twenty-one years, a feme covert, non compos mentis, or imprisoned, or unless such party, or the party sued, shall be at that time beyond the seas; in which cases the suit may be brought within *six* years after the party suing shall be of full age, discovert, of sane memory, or at large; or either the party suing, or the party sued, shall return from beyond the sea (*d*). (2)

10. In the Courts of Common Law the seamen may sue either the master, as the person immediately contracting with them and answerable to them, or the owners, as the persons virtually contracting with them through the agency of the master, and answerable for

(*d*) 4. *Ann. c.* 16. *s.* 17, 18, & 19. The length of time thus allowed may be very inconvenient in the case of a suit against the ship, if the property thereof has been changed. The *French* Ordinance allows only *one* year.

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(1) So in Blaine v. Ship Charles Carter, 3 Cranch. Rep. 328. the court held that seaman's wages are to be preferred to the lien of a bottomry bond.

(2) The act of Congress does not limit the time within which actions may be brought for mariners wages. Probably the ship would be held discharged in the case of a purchaser, under the same circumstances as would discharge the lien of a bottomry bond. As to this, see Blaine v. Ship Charles Carter, 4 Cranch. Rep. 328. cited ante p. 160.

the performance of his engagement (1). And
[471] actions in the Courts of Common law are also limited to the same period of *six* years, with the

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(1) So the master is liable for mariners' wages, although they have been hired by the owner. Farrell v. M'Clea, 1 Dall. Rep. 393. On abandonment of a ship under a policy of insurance, the owner, and not the insurer, is liable to the mariners for their wages. The contract between them is not dissolved. Brooks v. Dorr, 2 Mass. Rep. 39.

If an apprentice be impressed by the captain of a man of war, and the captain is informed that he is an apprentice, and refuses to discharge him, the master of the apprentice will be entitled in such case to recover his wages from the captain, who in such cases acts at his own peril. Eades v. Vandeput, 5 East. Rep. 39. note.

A receipt given by the mariners is not conclusive against his claim. Fraud, duress, misconception or mistake in either party, are open to inquiry. If in the settlement of the account any such ingredients appear, or any improper practices in obtaining the receipt are discovered, the whole matter is enquirable into, and justice must be done, notwithstanding any prima facie evidence, arising on the face of such receipts, tending to foreclose investigation. Jackson v. White, 1 Peters Adm. Rep. 179. Whiteman v. Ship Neptune, id. 180.

As the master is responsible to the mariners for their wages, he has been held an incompetent witness in libel for wages brought against the ship. Jones v. Brig Phœnix, 1 Peters. Adm. Rep. 201.; or an action against the owners. id. ibid. Atkins v. Burrows, id. 244. Malone v. Bell, id. 139.

Mariners cannot be witnesses for each other, if the witness and the party have a common interest in the point of contest, as if the question be loss of the ship, embezzlement, negligence, or misfeasance, equally affecting the whole crew, where all must

same provisoes (*e*), unless they are founded on a contract under seal; if they are founded on such a contract, the statutable limitation does not apply to them; but after a lapse of *twenty* years the claim will be presumed to have been satisfied without any proof of payment.

In suits in the Courts of Common Law, the form of action depends upon the nature of the contract: if the contract be under seal, and delivered as a deed, an action of debt or covenant must be brought; if it be not under seal or not so delivered, an action of debt or of assumpsit (*f*). And in order to enable the plaintiff to frame his declaration correctly, a Judge of the Court will order the defendant to shew the articles to the attorney for the plaintiff, and, if necessary, to give him a copy of them.

The course of pleading to be adopted by the defendant depends upon the form of the plaintiff's declaration, according to the general rules and distinctions respecting actions of debt, covenant and assumpsit, of which the consideration does not properly belong to a treatise on a single branch of the law.

(*e*) 21 Jas. 1. *c.* 16. *s.* 3. & 7 and 4 *Ann.* *c.* 16. *s.* 19.

(*f*) *Clement v. Gunhouse*, cited before part 4. ch. 1 sect. 1. p. 415.

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contribute in damages. But in other cases they may be admitted as witnesses. Per Judge Peters in Thompson v. Ship Philadelphia, 1 Peters. Adm. Rep. 210. But in case of a revolt they were admitted by Judge Davis in Johnson v. Ship Eliza, cited ante p 457. note. And in case of an alleged embezzlement, the Supreme Court of New-York, held that as they were not directly interested in the event of the suit, they were competent witnesses. Hoyt v. Wildfire, 3 John. Rep. 518.

THE END.

APPENDIX.

No. I.

FORM OF A BOTTOMRY BOND.

KNOW ALL MEN by these presents, that I, *A. B*, commander and two-thirds owner of the ship *Exeter*, for myself, and *C. D.* remaining third-owner of the said ship, am held and firmly bound unto *E. F.* in the penal sum of *two thousand pounds* sterling, for the payment of which well and truly to be made unto the said *E. F.* his heirs, executors, administrators, or assigns, I hereby bind myself, my heirs, executors and administrators, firmly by these presents. *In witness* whereof I have hereunto set my hand and seal, this 14th day of *December*, in the year of our Lord 1796.

WHEREAS the above bound *A. B.* hath taken up and received of the said *E. F.* the full and just sum of *one thousand pounds* sterling, which sum is to run at respondentia on the block and freight of the ship *Exeter*, whereof the said *A. B.* is now master, from the port or road of *Bombay* on a voyage to the port of *London*, having permission to touch, stay at, and proceed to all ports and places within the limits of the voyage, at the rate or premium of *twenty-five per cent.* (25 per cent.) for the voyage. In consideration whereof usual risks of the seas, rivers, enemies, fires, pirates, &c. are to be on account of the said *E. F.* And for the further security of the said *E. F.* the said *A. B.* doth by these presents mortgage and assign over to the said *E. F.* his heirs, executors, administrators, and assigns, the said ship *Exeter*, and her freight, together with all her tackle, apparel, &c. And it is hereby declared that the said ship *Exeter* and her freight is thus assigned over for the security of the respondentia taken up by the said *A. B.* and shall be delivered to no other use or purpose whatever, until payment of this bond is first made, with the premium that may become due thereon.

NOW THE CONDITION of this obligation is such, that if the above bound *A. B.* his heirs, executors, or administrators, shall and do well and truly pay, or cause to be paid unto the said *E. F* or to his attornies in *London* legally authorized to receive the same, their executors, administrators, or assigns, the full and just sum of 1000*l.* sterling, being the principal of this bond, together with the premium which shall become due thereupon, at or before the expiration of *ninety* days after the safe arrival of the said ship *Exeter* at her moorings in the river *Thames*, or in case of the loss of the said ship *Exeter*, such an average as by custom shall have become due on the salvage, then this obligation to be void and of no effect, otherwise to remain in full force and virtue. Having signed to three bonds of the same tenor and date, the one of which being accomplished, the other two to be void and of no effect.

A. B. for self and *C. D.** (L. S.)

Signed, sealed, and delivered, where no stamped paper is to be had. In the presence of *G. H.* *I. K.*

* In this bond the occasion of borrowing the money is not expressed, but the money was in reality borrowed to refit the ship, which being on a voyage from *Bengal* to *London* was obliged to put back to *Bombay* to repair. See *The* EXETER, *Whitford*, 1 Rob A. R. 176. The occasion therefore of borrowing the money gave the lender the security of the entire interest of the ship. But this bond, although expressed to be executed by the master for himself and the other part-owner, would not bind the other part-owner personally, unless he had by a previous deed authorized the master to execute such a bond for him. See *part* 3. *ch.* 1. *sect.* 2.

No. II.

FORM OF A BOTTOMRY BILL.

TO ALL MEN TO WHOM THESE PRESENTS SHALL COME. I, *A. B.* of *Bengal*, mariner, part-owner and master of the ship called the *Exeter*, of the burthen of five hundred tons and upwards, now riding at anchor in *Table-Bay* at the *Cape of Good Hope*, send greeting :

WHEREAS I, the said *A. B.* part-owner and master of the aforesaid ship called the *Exeter*, now in prosecution of a voyage from *Bengal* to the port of *London*, having put into *Table-Bay* for the purpose of procuring provisions and other

supplies necessary for the continuation and performance of the voyage aforesaid, am at this time necessitated to take up upon the adventure of the said ship called the *Exeter*, the sum of *one thousand pounds* sterling monies of *Great Britain*, for setting the said ship to sea, and furnishing provisions and necessaries for the said voyage, which sum *C. D.* of the *Cape of Good Hope*, master attendant, hath at my request lent unto me, and supplied me with at the rate of *twelve hundred and twenty pounds* sterling for the said *one thousand pounds*, being at the rate of *one hundred and twenty-two pounds* for every *hundred pounds* advanced as aforesaid, during the voyage of the said ship from *Table Bay* to *London*. NOW KNOW YE, that I, the said *A. B.* by these presents, do, for me, my executors, and administrators, covenant and grant to and with the said *C. D.* that the said ship shall, with the first convoy that shall offer for *England* after the date of these presents, sail and depart for the port of *London*, there to finish the voyage aforesaid. And I, the said *A. B.* in consideration of the sum of *one thousand pounds* sterling to me in hand paid by the said *C. D.* at and before the sealing and delivery of these presents, do hereby bind myself, my heirs, executors and administrators, my goods and chattels, and particularly the said ship, the tackle and apparel of the same, and also the freight of the said ship which is or shall become due for the aforesaid voyage from *Bengal* to the port of *London*, to pay unto the said *C. D.* his executors, administrators, or assigns, the sum of *twelve hundred and twenty pounds* of lawful British money, within thirty days next after the safe arrival of the said ship at the port of *London* from the same intended voyage.

AND I, the said *A. B.* do, for me, my executors, and administrators, covenant and grant to and with the said *C. D.* his executors and administrators, by these presents, that I, the said *A. B.* at the time of sealing and delivering of these presents, am a true and lawful part-owner and master of the said ship, and have power and authority to charge and engage the said ship with her freight as aforesaid, and that the said ship, with her freight, shall at all times after the said voyage, be liable and chargeable for the payment of the said *twelve hundred and twenty pounds*, according to the true intent and meaning of these presents.

AND lastly, it is hereby declared and agreed by and between the said parties to these presents, that in case the

said ship shall be lost, miscarry, or be cast away before her arrival at the said port of *London* from the said intended voyage, that then the payment of the said *twelve hundred and twenty pounds* shall not be demanded, or be recoverable by the said *C. D.* his executors, administrators, or assigns, but shall cease and determine, and the loss thereby be wholly borne and sustained by the said *C. D.* his executors, and administrators, and that then and from thenceforth every act, matter, and thing herein mentioned on the part and behalf of the said *A. B.* shall be void, any thing herein contained to the contrary notwithstanding.

IN WITNESS whereof the parties have interchangeably set their hands and seals to four bonds of this tenor and date, one of which being paid, the others to be null and void.

At the *Cape of Good Hope*, this 15th day of *November*, in the year of our Lord one thousand seven hundred and ninety-seven.

Witness, { *E. F.* / *G. H.* / *I. K.* } *A. B.* (L. S.)

No. III.

THE FORM OF A RESPONDENTIA BOND ON A VOYAGE TO THE EAST INDIES.

KNOW ALL MEN by these presents, that we, *James Peter Fearon*, commander of the ship *Belvidere*, in the service of the honourable *East-India* Company, and *Peter Douglas* of *Fitzroy-square*, are held and firmly bound to *Hans Busk* of *New Broadstreet*, *London*, merchant, in the sum or penalty of *fifteen hundred pounds* of good and lawful money of *Great-Britain*, to be paid to the said *Hans Busk*, or to his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, jointly and separately, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this *fourth* day of *May*, in the *forty-first* year of the reign of our Sovereign Lord *George the Third*, by the grace of God, of the united kingdom of *Great Britain*

and *Ireland* King, defender of the faith, and in the year of our Lord one thousand eight hundred and one.

WHEREAS the above-named *Hans Busk* has, on the day of the date above-written, advanced and lent unto the said *James Peter Fearon* and *Peter Douglas*, the sum of *seven hundred and fifty pounds*, upon the goods and merchandizes and effects laden and to be laden on board the good ship or vessel called the *Belvidere*, of the burthen of 937 tons or thereabouts, now riding at anchor in the river of *Thames*, outward-bound to *China*, and whereof *James Peter Fearon* is commander, by his acceptance of a bill of exchange to that amount at four months date for the account of them the said *James Peter Fearon* and *Peter Douglas:* NOW THE CONDITION of this obligation is such, that if the said ship or vessel do and shall with all convenient speed proceed and sail from and out of the said river of *Thames* on a voyage to any port or place, ports or places in the *East Indies*, *China*, *Persia*, or elsewhere beyond the *Cape of Good Hope*, and from thence do and shall sail, return, and come back into the said river of *Thames* at or before the end and expiration of *thirty-six* calendar months, to be accounted from the day of the date above written, and there to end her said intended voyage (the dangers and casualties of the seas excepted); and if the said *James Peter Fearon* and *Peter Douglas*, or either of them, their or either of their heirs, executors, or administrators, do and shall, within *thirty days* next after the said ship or vessel shall be arrived at her moorings in the said river of *Thames* from her said intended voyage, or at or upon the end and expiration of the said *thirty-six* calendar months, to be accounted as aforesaid (which of the said times shall first and next happen), well and truly pay or cause to be paid unto the said *Hans Busk*, his executors, administrators, or assigns, the full sum of *one thousand and twenty pounds* of lawful money of *Great Britain*, together with *thirteen pounds ten shillings* of like money per calendar month for each and every calendar month, and so proportionably for a greater or lesser time than a calendar month, for all such time and so many calendar months as shall be elapsed and run out of the said *thirty-six* calendar months over and above *twenty* calendar months, to be accounted from the day of the date above written, or if in the said voyage, and within the said *thirty-six* calendar months to be accounted as aforesaid, an utter loss of the said ship or

vessel by fire, enemies, men of war, or any other casualties shall unavoidably happen, and the said *James Peter Fearon* and *Peter Douglas*, their heirs, executors, or administrators, do and shall within *six* calendar months next after such loss, well and truly account for (upon oath if required) and pay unto the said *Hans Busk*, his executors, administrators, or assigns, a just and proportionable average on all the goods and effects of the said *James Peter Fearon* carried from *England* on board the said ship or vessel, and the net proceeds thereof, and on all other goods and effects which the said *James Peter Fearon* shall acquire during the said voyage for or by reason of such goods, merchandizes, and effects, and which shall not be unavoidably lost, then the above written obligation to be void and of none effect, else to stand in full force and virtue.

No. IV.

THE FORM OF AN INSTRUMENT OF HYPOTHECATION OF SHIP AND CARGO.

KNOW all to whom this instrument of bond and bill of maritime risk and bottomry may come, that in the year from the birth of our Lord Jesus Christ, 1801, on the 31st day of the month of *January*, in the city of *Lisbon*, in my office personally appeared *Jacomo Mazzola*, captain of the *Imperial* ship called the *Gratitudine*, whom I know to be the real person; and he declared to me the notary in the presence of the witnesses hereinafter mentioned, that within twenty-four hours after the arrival of his said ship at *London*, or any other port, and previous to beginning to make any delivery of the cargo at the port aforesaid, or any other port, that he the captain or whomsoever may act in lieu of him, or in the case of his absence, or perform the duties of his said quality, shall or will pay by this bill of risk, sea exchange, and bottomry, to *Francis Manoel Calvert*, professed in the order of Christ, or to his order, the sum of 5273*l.* 12*s.* sterling, principal and premium of risk and sea exchange, at the rate of 16 *per cent.* the which principal he acknowledged to have received here of the said *Francis Manoel Calvert*, in the good current money of this kingdom, under the denomination of true and legiti-

mate money of sea exchange and bottomry, on the hull, keel, and appurtenances of the aforesaid ship, and therewith to supply the wants of the repairs, caulking, and of the cargo of the same, on which he had effectively invested it; the said *Calvert* taking upon himself, and in consideration of the aforesaid premium of 16 *per cent.* voluntarily agreed for and settled between them, to run the sea risk on the said hull, keel, and appurtenances, and cargo of the said ship, in her ensuing voyage, which the said captain is about prosecuting from this port of *Lisbon* to that of *London*:—these being the risks which the aforesaid *Francis Manoel Calvert* takes on himself, and is to run, such as of the sea, winds, fire, stranding, and shipwreck, enemies, and false friends, detentions of princes, and reprizals, during the whole of said voyage, excepting nevertheless those of barratry of the master, and of average as well particular as general, the which are expressly excluded; the which risk shall commence to run from the hour the ship shall heave her first anchor to set sail from this port to that of *London*, and shall cease in twenty-four hours after having come to an anchor: and for the ready payment of the aforesaid sum, he the captain binds himself, and his effects in general, dues and funds, both in actual possession and future, and by special mortgage the cargo, freights due, or that may become due; and in case of failure of the prompt payment in due time, he binds himself under this clause of mortgage to pay to him or his order, for all the delay until full payment, at and after the rate of *six per cent. per annum;* and there being also present *Andrew Bellucci*, mate of the said ship, by whom it was declared, that in case of the absence of the aforesaid captain, he bound himself to fulfil the contents of this bond they thus executed and accepted, after these presents being read to them, and I the notary in the name of whomsoever it may concern being absent; to all which were witnesses present, *Joav Pedro Roeks*, who also acted as interpreter as well for the captain as for the mate, he being there vice-consul, and *Manoel Eugenio Coetho*, who together with the parties signed thereto. *J. Joge de Almeida Rorig* the notary wrote it: *Jacomo Mazzola*, *Andrew Bellucci*, *Joav Pedro Roeks*, *Manoel Eugenio Coetho;* and *J. Joge de Almeida Rorig*, notary public of notes in the city of *Lisbon* and its district of his Royal Highness the Prince Regent our lord, whom God preserve, caused this instrument to be transcribed

from my book of notes, to which I refer myself, and have subscribed it, and signed it in public form.

In testimony of the truth,

JOGE DE ALMEIDA DORIG.

Whose hand writing is certified by

FRANCIS ARBOUIN,
Vice-Consul.

Francis Manoel Calvert.

No. V.

ARTICLES OF AGREEMENT BETWEEN THE MASTER AND MARINERS.

IT is hereby agreed between the master, seamen, and mariners of the ship now bound for the port of and the master or commander of the said ship,

THAT in consideration of the monthly or other wages against each respective seaman or mariner's name hereunto set, they severally shall and will perform the abovementioned voyage; and the said master doth hereby agree with and hire the said seamen and mariner's for the said voyage at such monthly wages, to be paid pursuant to the laws of *Great Britain;* and they the said seamen and mariners do hereby promise and oblige themselves to do their duty, and obey the lawful commands of their officers on board the said ship or boats thereunto belonging, as become good and faithful seamen and mariners, and at all places where the said ship shall put in, or anchor during the said ship's voyage, to do their best endeavours for the preservation of the said ship and cargo, and not to neglect or refuse doing their duty by day or night; nor shall go out of the said ship on board any other vessel, or be on shore under any pretence whatsoever, *till the voyage is ended and the ship discharged of her cargo,* without leave first obtained of the master, captain, or commanding officer on board; and in default thereof they freely agree

to be liable to the penalties mentioned in the Act of Parliament, made in the second year of the reign of King *George* the Second, intitled, *An Act for the better Regulation and Government of Seamen in the Merchants' Service;* and the Act made in the thirty-seventh year of His present Majesty's reign, intitled, *An Act for preventing the Desertion of Seamen from* British *Merchant Ships trading to His Majesty's Colonies and Plantations in the* West Indies: And it is further agreed by the parties to these presents, that *twenty-four* hours absence, without leave, shall be deemed a total desertion, and render such seamen and mariners liable to the forfeitures and penalties contained in the Acts above recited; that each and every lawful command which the said master shall think necessary to issue for the effectual government of the said vessel, suppressing immorality and vice of all kinds, be strictly complied with under the penalty of the person or persons disobeying forfeiting his or their whole wages or hire, together with every thing belonging to him or them on board the said vessel: And it is further agreed, That no officer or seaman, or person belonging to the said ship, shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge, and her cargo delivered, nor less than *twenty days* in case the seaman is not employed in the delivery: And it is hereby further agreed between the master and officers of the said ship, That whatever apparel, furniture and stores, each of them may receive into their charge, belonging to the said ship, shall be accounted for on her return; and in case any thing shall be lost or damaged through their carelessness or insufficiency, it shall be made good by such officer or seaman by whose means it may happen to the master and owner of the said ship: And whereas it is customary for the officers and seamen on the ship's return home in the river, and during the time their cargoes are delivering, to go on shore each night to sleep, greatly to the prejudice of such ship and freighters; be it further agreed by the said parties, That neither officer nor seaman shall, on any pretence whatsoever, be entitled to such indulgence, but shall do their duty by day in discharge of the cargo, and keep such watch by night as the master or commander of the said ship shall think necessary, in order for the preservation of the above: And whereas it

often happens that part of the cargo is embezzled after being delivered into lighters, and as such losses are made good by the owners of the ships; be it therefore agreed by these presents, That whatever officer or seaman the master shall think proper to appoint, shall take charge of the cargo in the lighters, and go with the same to the lawful quay, and there deliver his charge to the ship's husband, or his representative, or see the same safely weighed at the King's beam, and in consequence of their true fidelity, such officer or seaman shall be entitled to *two shillings and sixpence* each lighter, exclusive of their monthly pay; and should it so happen that lighters are detained a considerable time at the quay before they can be unloaded, such officer and seaman so appointed shall in that case be entitled to *two shillings and sixpence* for every *twenty-four* hours, exclusive of their said monthly pay; that each seaman and mariner who shall well and truly perform the abovementioned voyage (provided always that there be no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores) shall be entitled to their wages or hire that may become due to him, pursuant to this agreement; that for the due performance of each and every the above mentioned articles and agreements, and acknowledgment of their being voluntary and without compulsion, or any other clandestine means being used, the said parties have hereto subscribed their names, the day and month set opposite to their respective names.

Place and Time of Entry.	MEN'S NAMES.	Quality.	Witness to each Man's signing.	Pay in the River.		Wages *per* Month, or by the Run for the Voyage.	Whole Wages.		
				Whole.	Half.		£	*s.*	*d.*

No. VI.

STIPULATION FOR THE RETURN OF A SHIP.

MARY ANN.

12*th January*, 1804.

ON which day *Bogg* exhibited as proctor, and made himself a party for *George Goodwin Hope*, master of the said ship *Mary Ann*, and produced for sureties *Josiah Culmer* of *Wapping High-Street*, mathematical instrument maker, and *James Powell* of the same place, undertaker, who, submitting themselves to the jurisdiction of this Court, bound themselves, their heirs, executors and administrators for the said *George Goodwin Hope*, in the sum of *six hundred and eighty-four pounds* of lawful money of *Great Britain*, being double the appraised value of two eighth parts of the said ship, unto *William Fennings* of *Rood-Lane*, *Fenchurch-street*, *London*, merchant, and *Philip Fennings* of *Harwich*, in the county of *Essex*, owners of the said two eighth parts or shares of the said ship, for the return of the said ship, to the amount of the shares of the said *William Fennings* and *Philip Fennings;* and unless they shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresover the same shall be found, to the value of the sum aforementioned; which caution the said surrogate received on the report of *John Crickett*, marshal of this Court, as to the sufficiency of the said sureties, and, at the petition of *Bogg*, decreed the said ship to be released from the arrest.

Present,

BEDFORD.

No. VII.

FORM OF A CHARTER PARTY.

THIS CHARTER PARTY of affreightment, indented, made and fully concluded upon, this day of in the year of our LORD one thousand eight hundred and between owner of the good of the burthen of

tons, or thereabouts, now lying in the harbour of whereof is at present master, on the one part, and on the other part, WITNESSETH, that the said for the consideration hereafter mentioned, ha letten to freight the aforesaid with the appurtenances to her belonging, for a voyage to be made by the said where she is to be discharged (the danger of the seas excepted:) And the said do by these presents covenant and agree with the said in manner following, that is to say, that the said in and during the voyage aforesaid, shall be tight, staunch and strong, and sufficiently tackled and apparelled with all things necessary for such a vessel and voyage: and that it shall and may be lawful for the said agents or factors, as well at as at to load and put on board the said loading of such goods and merchandize as they shall think proper, contraband goods excepted.

IN consideration whereof, the said do by these presents agree with the said well and truly to pay, or cause to be paid, unto in full for the freight or hire of the said and appurtenances, the sum of and so in proportion for a less time, as the said shall be continued in the aforesaid service, in days after her return to or in days after the said voyage shall be otherwise, in any manner whatsoever, determined and notice thereof to the said . And the said do agree to pay the charge of victualling and manning said and port charges and pilotage during said voyage, and to deliver said on her return to to the owner aforesaid or order.

And to the true and faithful performance of all and singular the covenants, payments and agreements aforementioned, each of the parties aforenamed binds and obliges himself, his executors and administrators in the penal sum of dollars, firmly by these presents. In witness whereof, the parties, aforesaid have hereunto interchangeably set their hands and seals, the day and year above written.

Signed, sealed and delivered, in presence of us,

No. VIII.

FORM OF A SHIPPING PAPER.

IT IS AGREED, between the master and seamen or mariners of the master, now bound from the port of for THAT in consideration of the monthly, or other wages, against each respective seaman or mariner's name hereunto set, they severally shall and will perform the above mentioned voyage; and the said master doth hereby agree with, and hire the said seamen or mariners for the said voyage, at such monthly wages or prices, to be paid pursuant to this agreement, and the laws of the Congress of the United States of America, and the custom and usage of the port of And they, the said seamen or mariners do hereby promise and oblige themselves, to do their duty, and obey the lawful commands of their officers on board the said vessel, or on board the boats thereunto belonging, as becomes good and faithful seamen or mariners; and at all places where the said vessel shall put in, or anchor at, during the said voyage, to do their best endeavours for the preservation of the said vessel and her cargo, and not to neglect or refuse doing their duty by day or night, nor shall go out of the said vessel, on board any other vessel, or on shore, under any pretence whatsoever, without leave first obtained from the captain, or commanding officer on board. That in default thereof they will be liable to the penalties mentioned in the act of Congress, for the government and regulation of seamen in the merchants' service, in which it is enacted, "That if any seaman or mariner shall absent himself from on board the ship or vessel, without leave of the master, or officer commanding on board; and the mate, or other officer having charge of the log-book, shall make entry therein, of the name of such seaman or mariner, on the day on which he shall so absent himself; and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they

may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel; and moreover shall be liable to pay to him or them, all damages which he or they may sustain, by being obliged to hire other seamen or mariners in his or their place. *And it is further agreed*, by both parties, that each and every lawful command which the said master shall think necessary hereafter to issue, for the effectual government of the said vessel, suppressing immorality and vice of all kinds, be strictly complied with, under the penalty of the person or persons disobeying, forfeiting his or their whole wages, or hire, together with every thing belonging to him or them, on board said vessel. *And it is further agreed*, That no officer or seaman, belonging to the said vessel, shall demand or be entitled to his wages, or any part thereof, until the arrival of the said vessel, at the port of her discharge, and her cargo delivered.

And it is further agreed, between the master and officers of the said vessel, that whatever apparel, furniture and stores, each of them may receive into their charge, belonging to said vessel, shall be accounted for on her return; and in case any thing shall be lost or damaged through their carelessness or insufficiency, it shall be made good by such officer or seaman by whose means it may happen, to the master and owner of the said vessel. And whereas it is customary for the officers and seamen on the vessel's return home, in the harbour, and whilst her cargo is delivering, to go on shore each night to sleep, greatly to the prejudice of such vessel and freighters: *Be it further agreed*, by the said parties, that neither officer or seaman, shall, on any pretence whatsoever, be entitled to such indulgence, but shall do their duty by day in discharge of her cargo, and keep such watch by night as the master shall think proper to order, for the preservation of the same. And whereas it often happens that part of the cargo is embezzled after being safely delivered into lighters; and as such losses are made good by the owners of the vessels—*Be it therefore agreed*, by these presents, that whatever officer or seaman the master shall think proper to appoint, shall take charge of her cargo in the lighters, and go with it to the lawful key, and there deliver his cargo to the vessel's husband, or his representative, or see the same safely landed.—That each seaman and mariner who shall well and truly perform the abovementioned voyage (pro-

vided always that there be no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores) shall be entitled to the payment of the wages or hire that may become due to him, pursuant to this agreement, as to their names is severally affixed and set forth.

For the due performance of each and every of the abovementioned articles and agreements, and acknowledgment of their being voluntary and without compulsion, or any other clandestine means being used, agreed to and signed by us; and in testimony thereof, we have each and every one of us affixed our hands, the month and day against our names affixed, and in the year of our LORD one thousand eight hundred and

Time agreed to enter on board for duty.	Men's Names.	Stations.	Witnesses to their signing.	Advance Wages.	Wages pr. Month.	Privilege.	Time of discharge.	Months and days in pay.	Whole wages.	Hospital money.	Wages due.

No. IX.

FORM OF A BILL OF SALE OF A *REGISTERED* SHIP.

TO all people to whom this present bill of sale shall come, SEND GREETING.

Know ye, that the said for and in consideration of to in hand, well and truly paid, at or before the ensealing and delivery of these presents, by the receipt whereof do hereby acknowledge, and therewith fully and entirely satisfied and contented, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said all the hull or body of the good together with all and singular her now lying at and at the port of the certificate of whose registry is as follows, viz.

IN pursuance of an act of the Congress of the United States of America, entitled, "An act concerning the registering and recording of ships or vessels," having taken and subscribed the required by the said act; and having that only owners of the ship or vessel called the of whereof is at present master, and is a citizen of the United States *and that the said ship or vessel was And having certified that the said ship or vessel has deck and mast; and that her length is her breadth her depth and that she measures tons; that she is has and head; and the said having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said act, the said has been duly registered at the port of*

Given under hand and seal at the port of this day of in the year one thousand eight hundred and

TO HAVE AND TO HOLD, the said granted and bargained and premises, with all the appurtenances, unto the said heirs, executors, administrators or assigns, to only proper use, benefit and behoof forever. And the said do avouch to be the true and lawful owner of the said and her appurtenances, and have in full power, good right, and lawful authority, to dispose of the said and her appurtenances in manner as aforesaid. And furthermore, the said do hereby covenant and agree to warrant and defend

the said and appurtenances, against the lawful claims and demands of all persons whatsoever, unto the said

In witness whereof, the said ha hereunto set hand and seal the day of in the year of our LORD one thousand eight hundred and

Signed, sealed and delivered, in presence of us,

No. X.

FORM OF A BILL OF SALE OF AN *ENROLLED* SHIP.

TO all people to whom this present bill of sale shall come,

SEND GREETING.

KNOW YE, that the said for and in consideration of to in hand, well and truly paid, at or before the ensealing and delivery of these presents, by the receipt whereof do hereby acknowledge, and therewith fully and entirely satisfied and contented, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said all the hull or body of the good together with all and singular her now lying at and at the port of the certificate of whose enrolment is as follows, viz.

No. *ENROLMENT, in conformity to an act of the Congress of the United States of America, entitled "an act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."*

having taken or subscribed the required by the said act, and having that citizen of the United States, sole owner of the ship or vessel called the of whereof is present master, and as he hath is a citizen of the United States, and that the said ship or vessel was and having certified that the said ship or vessel has deck and mast and that her length is her breadth her depth and that she measures tons; that she is has and head; and the said having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said act, the said has been duly enrolled at the port of

Given under hand and seal at the port of this day of in the year one thousand eight hundred

TO HAVE AND TO HOLD the said granted and bargained and premises, with the appurtenances, unto the said heirs, executors, administrators or assigns, to only proper use, benefit and behoof forever. And the said do avouch to be the true and lawful owner of the said and her appurtenances, and have in full power, good right, and lawful authority to dispose of the said and her appurtenances in manner as aforesaid. And furthermore the said do hereby covenant and agree to warrant and defend the said and appurtenances, against the lawful claims and demands of all persons whatsoever, unto the said

In witness whereof, the said ha hereunto set hand and seal the day of in the year of our Lord one thousand eight hundred and

Signed, sealed and delivered, &c.

No. XI.

An Act concerning the Registering and Recording of Ships or Vessels.

Sec. 1. BE *it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That ships or vessels, which shall have been registered by virtue of the act, intitled, "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," and those which after the last day of March next, shall be registered, pursuant to this act, and no other (except such as shall be duly qualified, according to law, for carrying on the coasting trade and fisheries, or one of them) shall be denominated and deemed ships or vessels of the United States, entitled to the benefits and privileges appertaining to such ships or vessels; *Provided*, That they shall not continue to enjoy the same, longer than they shall continue to be wholly owned, and to be commanded by a citizen or citizens of the said States.

Sec. 2. *And be it further enacted*, That ships or vessels built within the United States, whether before, or after, the fourth of July, one thousand seven hundred and seventy-six, and belonging wholly to a citizen or citizens thereof, or not built within the said States, but on the sixteenth

day of May, in the year one thousand seven hundred and eighty-nine, belonging, and thenceforth continuing to belong to a citizen or citizens thereof, and ships or vessels, which may hereafter be captured in war, by such citizen or citizens, and lawfully condemned as prize, or which have been or may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by a citizen or citizens thereof, and no other, may be registered as herein after directed: *Provided*, That no such ship or vessel shall be entitled to be so registered, or if registered, to the benefits thereof, if owned in whole, or in part, by any citizen of the United States, who usually resides in a foreign country, during the continuance of such residence, unless such citizen be in the capacity of a consul of the United States, or an agent for, and a partner in, some house of trade or co-partnership, consisting of citizens of the said States actually carrying on trade within the said States: *And provided further*, That no ship or vessel, built within the United States, prior to the said sixteenth day of May, which was not then owned wholly, or in part, by a citizen or citizens of the United States, shall be capable of being registered, by virtue of any transfer to a citizen or citizens, which may hereafter be made, unless by way of prize or forfeiture: *Provided nevertheless*, That this shall not be construed to prevent the registering anew, of any ship or vessel, which was before registered, pursuant to the act before mentioned.

Sec. 3. *And be it further enacted*, That every ship or vessel, hereafter to be registered (except as is herein after provided) shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong, at the time of her registry, which port shall be deemed to be that, at or nearest to which, the owner, if there be but one, or if more than one, the husband or acting and managing owner of such ship or vessel, usually resides. And the name of the said ship or vessel, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length. And if any ship or vessel of the United States, shall be found without having her name, and the name of the port to which she belongs, painted in manner aforesaid, the owner or owners shall forfeit fifty dollars; one half to the person giving the information thereof, the other half to the use of the United States.

Sec. 4. *And be it further enacted*, That in order to the registry of any ship or vessel, an oath or affirmation shall be taken and subscribed by the owner, or by one of the owners thereof, before the officer authorized to make such registry, who is hereby empowered to administer the same, declaring, according to the best of the knowledge and belief of the person so swearing or affirming, the name of such ship or vessel, her burthen, the place where she was built, if built within the United States, and the year in which she was built; and if built within the United States, before the sixteenth day of May, one thousand seven hundred and eighty-nine, that she was then owned wholly, or in part, by a citizen or citizens of the United States; and if not built within the United States, that she was, on the said sixteenth day of May, and ever since hath continued to be, the entire property of a citizen or citizens of the United States; or that she was, at some time posterior to the time when this act shall take effect, (specifying the said time) captured in war by a citizen or citizens of the said States, and lawfully condemned as prize (producing a copy of the sentence of condemnation, authenticated in the usual forms) or that she has been adjudged to be forfeited for a breach of the laws of the United States (producing a like copy of the sentence whereby she shall have been so adjudged) and declaring his or her name and place of abode, and if he or she be the sole owner of the said ship or vessel, that such is the case; or if there be another owner or other owners, that there is or are such other owner or owners, specifying his, her, or their names, and place or places of abode, and that he, she, or they, as the case may be, so swearing or affirming, is or are citizens of the United States; and where an owner resides in a foreign country, in the capacity of a consul of the United States, or as an agent for, and a partner in, a house or co-partnership, consisting of citizens of the United States, and actually carrying on trade within the United States, that such is the case, and that there is no subject or citizen of any foreign prince or State, directly, or indirectly, by way of trust, confidence, or otherwise, interested in such ship or vessel, or in the profits, or issues thereof; and that the master or commander thereof is a citizen, naming the said master, or commander, and stating the means whereby, or manner in which, he is so a citizen. And in case, any of the matters of fact, in the said oath or affirmation alledged, which

shall be within the knowledge of the party, so swearing, or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which, the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person, by whom such oath or affirmation shall have been made: *Provided always*, That if the master, or person having the charge or command of such ship or vessel, shall be within the district aforesaid, when application shall be made for registering the same, he shall, himself, make oath, or affirmation, instead of the said owner, touching his being a citizen, and the means whereby, or manner in which, he is so a citizen; in which case, if what the said master, or person having the said charge or command, shall so swear or affirm, shall not be true, the forfeiture aforesaid shall not be incurred, but he shall, himself, forfeit and pay, by reason thereof, the sum of one thousand dollars: *And provided further*, That in the case of a ship, or vessel, built within the United States, prior to the sixteenth day of May aforesaid, which was not then owned by a citizen, or citizens of the United States, but which, by virtue of a transfer to such citizen, or citizens, shall have been registered, pursuant to the act before mentioned, the oath or affirmation, hereby required, shall and may be varied, according to the truth of the case, as often as it shall be requisite to grant a new register, for such ship or vessel.

Sec. 5. *And be it further enacted*, That it shall be the duty of every owner, resident within the United States, of any ship or vessel, to which a certificate of registry may be granted, (in case there be more than one such owner) to transmit to the collector, who may have granted the same, a like oath or affirmation with that herein before directed to be taken and subscribed by the owner, on whose application, such certificate shall have been granted, and within ninety days after the same may have been so granted; which oath or affirmation may, at the option of the party, be taken and subscribed, either before the said collector, or before the collector of some other district, or a judge of a supreme, or a district court of the United States, or of a superior court of original jurisdiction of some one of the states. And if such oath or affirmation shall not be taken, subscribed and transmitted, as is herein required, the certificate of registry, granted to such ship or vessel, shall be forfeit and void.

Sec. 6. *And be it further enacted*, That before any ship or vessel shall be registered, she shall be measured by a surveyor, if there be one, or by the person he shall appoint, at the port or place where the said ship or vessel may be, and if there be none, by such person as the collector of the district, within which she may be, shall appoint, according to the rule prescribed by the forty-third section of the act, intitled, "An act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandize, imported into the United States, and on the tonnage of ships or vessels." And the officer, or person, by whom such admeasurement shall be made, shall, for the information of, and as a voucher to the officer by whom the registry is to be made, grant a certificate, specifying the built of such ship or vessel, her number of decks and masts, her length, breadth, depth, the number of tons she measures, and such other particulars as are usually descriptive of the identity of a ship or vessel; and that her name, and the place to which she belongs, are painted on her stern, in manner required by the third section of this act; which certificate shall be countersigned by an owner, or by the master of such ship or vessel, or by some other person who shall attend her admeasurement, on behalf of her owner or owners, in testimony of the truth of the particulars therein contained; without which, the said certificate shall not be valid. But in all cases, where a ship or vessel has before been registered, as a ship or vessel of the United States, it shall not be necessary to measure her anew, for the purpose of obtaining another register; except such ship or vessel shall have undergone some alteration, as to her burthen, subsequent to the time of her former registry.

Sec. 7. *And be it further enacted*, That previous to the registry of any ship or vessel, the husband, or acting and managing owner, together with the master thereof, and one or more sureties, to the satisfaction of the collector of the district, whose duty it is to make such registry, shall become bound to the United States, if such ship or vessel shall be of burthen not exceeding fifty tons, in the sum of four hundred dollars; if of burthen above fifty tons, and not exceeding one hundred, in the sum of eight hundred dollars; if of burthen above one hundred tons, and not exceeding two hundred, in the sum of twelve hundred dollars; if of burthen above two hundred tons, and not

exceeding three hundred, in the sum of sixteen hundred dollars; and if of burthen exceeding three hundred tons, in the sum of two thousand dollars; with condition, in each case, that the certificate of such registry, shall be solely used for the ship, or vessel, for which it is granted, and shall not be sold, lent, or otherwise disposed of, to any person or persons whomsoever; and that, in case such ship or vessel shall be lost, or taken by an enemy, burnt, or broken up, or shall be otherwise prevented from returning to the port to which she may belong, the said certificate, if preserved, shall be delivered up, within eight days after the arrival of the master, or person having the charge or command of such ship or vessel, within any district of the United States, to the collector of such district; and that if any foreigner, or any person or persons, for the use and benefit of such foreigner, shall purchase or otherwise become entitled to the whole, or any part or share of, or interest in, such ship or vessel, the same being within a district of the United States, the said certificate shall, in such case, within seven days after such purchase, change, or transfer of property, be delivered up to the collector of the said district; and that if any such purchase, change, or transfer of property, shall happen, when such ship or vessel shall be at any foreign port or place, or at sea, then the said master, or person having the charge or command thereof, shall, within eight days after his arrival within any district of the United States, deliver up the said certificate to the collector of such district; and every such certificate, so delivered up, shall be forthwith transmitted to the Register, of the Treasury, to be cancelled, who, if the same shall have been delivered up to a collector, other than of the district in which it was granted, shall cause notice of such delivery to be given to the collector of the said district.

Sec. 8. *And be it further enacted*, That in order to the registry of any ship or vessel, which, after the last day of March next, shall be built within the United States, it shall be necessary to produce a certificate, under the hand of the principal or master carpenter, by whom, or under whose direction, the said ship or vessel shall have been built, testifying that she was built by him, or under his direction, and specifying the place where, the time when, and the person or persons for whom, and describing her built, number of decks and masts, length, breadth, depth,

tonnage, and such other circumstances, as are usually descriptive of the identity of a ship or vessel; which certificate shall be sufficient to authorize the removal of a new vessel, from the district where she may be built, to another district in the same, or an adjoining State, where the owner or owners actually reside, provided it be with ballast only.

Sect. 9. *And be it further enacted*, That the several matters herein before required, having been complied with, in order to the registering of any ship or vessel, the collector of the district comprehending the port to which she shall belong, shall make, and keep, in some proper book, a record or registry thereof, and shall grant an abstract or certificate of such record or registry, as nearly as may be, in the form following:

"In pursuance of an act of the Congress of the United States of America, intitled, "An act concerning the registering and recording of ships or vessels," [inserting here the name, occupation, and place of abode, of the person by whom the oath or affirmation aforesaid, shall have been made] having taken or subscribed the oath (or affirmation) required by the said act, and having sworn (or affirmed) that he (or she, and if more than one owner, adding the words, "together with," and the name or names, occupation or occupations, place or places of abode, of the other owner or owners) is (or are) the only owner (or owners) of the ship or vessel, called the [inserting here her name] of [inserting here, the port to which she may belong] whereof [inserting here, the name of the master] is at present master, and is a citizen of the United States, and that the said ship or vessel was [inserting here, when and where built] and [inserting here, the name and office, if any, of the person by whom she shall have been surveyed or admeasured] having certified that the said ship or vessel has [inserting here, the number of decks] and [inserting here, the number of masts] and that her length is [inserting here, the number of feet] her breadth [inserting here, the number of feet] her depth [inserting here, the number of feet] and that she measures [inserting here, her number of tons] that she is [describing here, the particular kind of vessel, whether ship, brigantine, snow, schooner, sloop, or whatever else, together with her built, and specifying whether she has any, or no gallery or head] and the said [naming the owner, or the master, or other person, acting in behalf of the owner or owners, by whom the certificate of admeasure-

ment shall have been countersigned, as aforesaid] having agreed to the description and admeasurement, above specified, and sufficient security having been given, according to the said act, the said ship or vessel has been duly registered at the port of [naming the port where registered]. Given under my hand and seal, at [naming the said port] this [inserting the particular day] day of [naming the month] in the year [specifying the number of the year, in words at length:"] *Provided*, That if the master, or person having the charge or command of such ship or vessel, shall, himself, have made oath or affirmation, touching his being a citizen, the wording of the said certificate shall be varied so as to be conformable to the truth of the case: *And provided*, That where a new certificate of registry is granted, in consequence of any transfer of a ship or vessel, the words shall be so varied, as to refer to the former certificate of registry, for her admeasurement.

Sec. 10. *And be it further enacted*, That it shall be the duty of the Secretary of the Treasury, to cause to be prepared, and transmitted, from time to time, to the collectors of the several districts, a sufficient number of forms of the said certificates of registry, attested under the seal of the Treasury, and the hand of the Register thereof, with proper blanks, to be filled by the said collectors, respectively, by whom also the said certificates shall be signed and sealed, before they shall be issued; and where there is a naval officer at any port, they shall be countersigned by him; and where there is a surveyor, but no naval officer, they shall be countersigned by him; and a copy of each shall be transmitted to the said Register, who shall cause a record to be kept of the same.

Sec. 11. *And be it further enacted*, That where any citizen or citizens of the United States shall purchase, or become owner or owners of any ship or vessel, entitled to be registered, by virtue of this act, such ship or vessel, being within any district, other than the one in which he or they usually reside, such ship or vessel shall be entitled to be registered by the collector of the district, where such ship or vessel may be, at the time of his or their becoming owner or owners thereof, upon his or their complying with the provisions herein before prescribed, in order to the registry of ships or vessels: And the oath or affirmation which is required to be taken may, at the option of such owner or owners be taken, either before the collector

of the district, comprehending the port to which such ship or vessel may belong, or before the collector of the district within which such ship or vessel may be, either of whom is hereby empowered to administer the same: *Provided nevertheless*, That whenever such ship or vessel shall arrive within the district, comprehending the port to which such ship or vessel shall belong, the certificate of registry, which shall have been obtained, as aforesaid, shall be delivered up to the collector of such district, who, upon the requisites of this act, in order to the registry of ships or vessels, being complied with, shall grant a new one, in lieu of the first; and the certificate, so delivered up, shall forthwith be returned by the collector who shall receive the same, to the collector who shall have granted it: and if the said first mentioned certificate of registry shall not be delivered up, as above directed, the owner or owners, and the master of such ship or vessel, at the time of her said arrival within the district comprehending the port to which such ship or vessel may belong, shall, severally, forfeit the sum of one hundred dollars, to be recovered with costs of suit; and the said certificate of registry shall be thenceforth void. And in case any of the matters of fact, in the said oath or affirmation alleged, which shall be within the knowledge of the party so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which, the same shall have been made, or of the value thereof, to be recovered with costs of suit, of the person by whom such oath or affirmation shall have been made: *Provided always*, That if the master, or person having the charge or command of such ship or vessel, shall be within the district aforesaid, when application shall be made for registering the same, he shall, himself, make oath or affirmation, instead of the said owner, touching his being a citizen, and the means whereby, or manner in which he is so a citizen; in which case, if what the said master, or person having the said charge or command, shall so swear or affirm, shall not be true, the forfeiture aforesaid shall not be incurred, but he shall, himself, forfeit and pay, by reason thereof, the sum of one thousand dollars.

Sec. 12. *And be it further enacted*, That when any ship or vessel, entitled to be registered, pursuant to this act, shall be purchased by an agent or attorney for, or on account of a citizen or citizens of the United States, such ship

or vessel, being in a district of the United States, more than fifty miles distant, taking the nearest usual route by land, from the one comprehending the port to which, by virtue of such purchase, and by force of this act, such ship or vessel ought to be deemed to belong, it shall be lawful for the collector of the district, where such ship or vessel may be, and he is hereby required, upon the application of such agent or attorney, to proceed to the registering of the said ship or vessel, the said agent or attorney, first complying on behalf, and in the stead of, the owner or owners thereof, with the requisites prescribed by this act, in order to the registry of ships or vessels, except, that in the oath or affirmation, which shall be taken by the said agent or attorney, instead of swearing or affirming that he is owner, or an owner of such ship or vessel, he shall swear or affirm, that he is agent or attorney for the owner or owners thereof, and that he hath bona fide purchased the said ship or vessel, for the person or persons, whom he shall name and describe as the owner or owners thereof: *Provided nevertheless*, that whenever such ship or vessel shall arrive within the district comprehending the port to which such ship or vessel shall belong, the certificate of registry, which shall have been obtained, as aforesaid, shall be delivered up to the collector of such district, who, upon the requisites of this act, in order to the registry of ships or vessels, being complied with, shall grant a new one, in lieu of the first; and the certificate, so delivered up, shall forthwith be returned by the collector, who shall transmit the same to the collector who shall have granted it. And if the said first mentioned certificate of registry, shall not be delivered up as above directed, the owner or owners, and the master of such ship or vessel, at the time of her said arrival within the district comprehending the port to which she may belong, shall, severally, forfeit the sum of one hundred dollars, to be recovered with costs of suit, and the said certificate of registry shall be thenceforth void. And in case any of the matters of fact, in the said oath or affirmation alleged, which shall be within the knowledge of the party, so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which, the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath or affirmation shall have been made: *Provided always*,

That if the master, or person having the charge or command of such ship or vessel, shall be within the district aforesaid, when application shall be made for registering the same, he shall, himself, make oath or affirmation, instead of the said agent or attorney, touching his being a citizen, and the means whereby, or manner in which, he is so a citizen; in which case, if what the said master, or person having the said charge or command, shall so swear or affirm, shall not be true, the forfeiture aforesaid shall not be incurred, but he shall, himself, forfeit and pay, by reason thereof, the sum of one thousand dollars.

Sec. 13. *And be it further enacted*, That if the certificate of the registry of any ship or vessel shall be lost or destroyed, or mislaid, the master or other person having the charge or command thereof, may make oath or affirmation, before the collector of the district where such ship or vessel shall first be, after such loss, destruction, or mislaying, who is hereby authorized to administer the same, which oath or affirmation shall be of the form following: "I (inserting here the name of the person swearing or affirming) being master (or having the charge or command) of the ship or vessel, called the (inserting the name of the vessel) do swear (or affirm) that the said ship or vessel, hath been, as I verily believe, registered according to law, by the name of (inserting again the name of the vessel) and that a certificate thereof was granted by the collector of the district of (naming the district where registered) which certificate has been lost (or destroyed, or unintentionally, and by mere accident mislaid as the case may be) and (except where the certificate is alleged to have been destroyed) that the same, if found again, and within my power, shall be delivered up to the collector of the district, in which it was granted;" which oath, or affirmation shall be subscribed by the party making the same, and upon such oath or affirmation being made and the other requisites of this act, in order to the registry of ships or vessels, being complied with, it shall be lawful for the collector of the district, before whom such oath or affirmation is made, to grant a new register inserting therein, that the same is issued, in the room of the one lost or destroyed. But in all cases, where a register shall be granted, in lieu of the one lost or destroyed, by any other than the collector of the district, to which the ship, or vessel actually belongs, such register shall within ten days, after her first arrival within the dis-

trict to which she belongs, be delivered up to the collector of the said district, who shall thereupon grant a new register, in lieu thereof. And in case the master or commander shall neglect to deliver up such register, within the time aforesaid, he shall forfeit one hundred dollars; and the former register shall become null and void.

Sec. 14. *And be it further enacted*, That when any ship or vessel, which shall have been registered, pursuant to this act, or the act hereby in part repealed, shall, in whole, or in part, be sold, or transferred to a citizen or citizens of the United States, or shall be altered in form, or burthen, by being lengthened, or built upon, or from one denomination to another, by the mode or method of rigging or fitting, in every such case the said ship or vessel shall be registered anew, by her former name, according to the directions herein before contained (otherwise she shall cease to be deemed a ship or vessel of the United States) and her former certificate of registry shall be delivered up to the collector to whom application for such new registry shall be made, at the time that the same shall be made, to be by him transmitted to the Register of the Treasury, who shall cause the same to be cancelled. And in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length, the said certificate, otherwise the said ship or vessel shall be incapable of being so registered anew. And in every case, in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States. And further, if her said former certificate of registry shall not be delivered up, as aforesaid, except where the same may have been destroyed, lost, or unintentionly mislaid, and on oath or affirmation thereof shall have been made, as aforesaid, the owner or owners of such ship or vessel shall forfeit and pay the sum of five hundred dollars, to be recovered with costs of suit.

Sec. 15. *And be it further enacted*, That when the master, or person having the charge or command of a ship or vessel, registered pursuant to this act, or the act hereby in part repealed, shall be changed, the owner, or one of the owners, or the new master of such ship or vessel, shall report such change to the collector of the district where the same shall happen, or where the said ship or vessel shall first

be, after the same shall have happened, and shall produce to him the certificate of registry of such ship or vessel, and shall make oath or affirmation, shewing that such new master is a citizen of the United States, and the manner in which, or means whereby, he is so a citizen; whereupon the said collector shall indorse upon the said certificate of registry, a memorandum of such change, specifying the name of such new master, and shall subscribe the said memorandum with his name, and if other than the collector of the district, by whom the said certificate of registry shall have been granted, shall transmit a copy of the said memorandum to him, with notice of the particular ship or vessel, to which it shall relate; and the collector of the district, by whom the said certificate shall have been granted, shall make a like memorandum of such change, in his book of registers, and shall transmit a copy thereof, to the Register of the Treasury. And if the said change shall not be reported, or if the said oath or affirmation shall not be taken, as above directed, the registry of such ship or vessel shall be void, and the said master, or person, having the charge or command of her, shall forfeit and pay the sum of one hundred dollars.

Sec. 16. *And be it further enacted*, That if any ship or vessel heretofore registered, or which shall hereafter be registered, as a ship or vessel of the United States, shall be sold or transferred in whole or in part, by way of trust, confidence or otherwise, to a subject or citizen of any foreign prince or state, and such sale or transfer shall not be made known, in manner herein before directed, such ship or vessel, together with her tackle, apparel and furniture, shall be forfeited: *Provided*, That if such ship or vessel shall be owned in part only, and it shall be made to appear to the jury, before whom the trial for such forfeiture shall be had, that any other owner of such ship or vessel, being a citizen of the United States, was wholly ignorant of the sale or transfer to, or ownership of, such foreign subject or citizen, the share or interest of such citizen of the United States shall not be subject to such forfeiture; and the residue only shall be so forfeited.

Sec. 17. *And be it further enacted*, That upon the entry of every ship or vessel of the United States, from any foreign port or place, if the same shall be at the port or place, at which the owner, or any of the part-owners reside, such owner or part-owners, shall make oath or affirma-

tion, that the register of such ship or vessel contains the name or names of all the persons, who are then owners of the said ship or vessel; or if any part of such ship or vessel has been sold or transferred, since the granting of such register, that such is the case, and that no foreign subject or citizen hath, to the best of his knowledge and belief, any share, by the way of trust, confidence or otherwise, in such ship or vessel. And if the owner, or any part-owner, shall not reside at the port or place, at which such vessel shall enter, then the master or commander shall make oath or affirmation, to the like effect. And if the owner, or part-owner, where there is one, or the master or commander, where there is no owner, shall refuse to swear or affirm as aforesaid, such ship or vessel shall not be entitled to the privileges of a ship or vessel of the United States.

Sec. 18. *And be it further enacted*, That in all cases, where the master, commander, or owner of a ship or vessel, shall deliver up the register of such ship or vessel, agreeable to the provisions of this act, if to the collector of the district, where the same shall have been granted, the said collector shall, thereupon, cancel the bond, which shall have been given at the time of granting such register; or, if to the collector of any other district, such collector shall grant to the said master, commander or owner, a receipt or acknowledgment, that such register has been delivered to him, and the time, when; and upon such receipt being produced to the collector, by whom the register was granted, he shall cancel the bond of the party, as if the register had been returned to him.

Sec. 19. *And be it further enacted*, That the collector of each district shall progressively number the certificates of the registry by him granted, beginning anew, at the commencement of each year, and shall enter an exact copy of each certificate, in a book to be kept for that purpose; and shall, once in three months, transmit to the Register of the Treasury, copies of all the certificates, which shall have been granted by him, including the number of each.

Sec. 20. *And be it further enacted*, That every ship or vessel, built in the United States, after the fifteenth day of August, one thousand seven hundred and eighty nine, and belonging wholly, or in part, to the subjects of foreign powers, in order to be entitled to the benefits of a ship, built and recorded in the United States, shall be recorded in the office of the collector of the district, in which such

ship or vessel was built, in manner following, that is to say; The builder of every such ship or vessel, shall make oath or affirmation, before the collector of such district, who is hereby authorized to administer the same, in manner following: "I [inserting here the name of such builder] of [inserting here the place of his residence] shipwright, do swear [or affirm] that [describing here the kind of vessel, as, whether ship, brig, snow, schooner, sloop, or whatever else] named [inserting here the name of the ship or vessel] having [inserting here the number of decks] and being, in length [inserting here the number of feet] in breadth [inserting here the number of feet] in depth [inserting here the number of feet] and measuring [inserting here the number of tons] having [specifying, whether any or no] gallery, and [also specifying, whetherer any or no] head, was built by me, or under my direction, at [naming the place, county and State] in the United States, in the year [inserting here the number of the year;"] which oath or affirmation, shall be subscribed by the person making the same, and shall be recorded in a book, to be kept, by the said collecter, for that purpose.

Sec. 21. *And be it further enacted*, That the said collector shall cause the said ship or vessel to be surveyed or admeasured, according to the rule, prescribed by the forty-third section of the act, intitled, "An act to provide more effectually for the collection of the duties imposed by law on goods, wares, and merchandize, imported into the United States, and on the tonnage of ships or vessels;" and the person, by whom such admeasurement shall be made, shall grant a certificate thereof, as in the case of a ship or vessel to be registered; which certificate shall be countersigned by the said builder, and by an owner, or the master, or person having the command or charge thereof, or by some other person, being an agent for the owner or owners thereof, in testimony of the truth of the particulars therein contained.

Sec. 22. *And be it further enacted*, That a certificate of the said record, attested under the hand and seal of the said collector, shall be granted to the master of every such ship or vessel, as nearly as may be, of the form following: "In pursuance of an act, intitled, "An act concerning the registering and recording of ships or vessels," I (inserting here the name of the collector of the district) of (inserting here the name of the district) in the United States,

do certify, that, (inserting here the name of the builder) of (inserting here the place of his residence, county, and State) having sworn, or affirmed, that the (describing the ship or vessel, as in the certificate of record) named (inserting here her name) whereof (inserting here the name of the master) is, at present master, was built at (inserting here the name of the place, county and State, where built) by him, or under his direction, in the year (inserting here the number of the year) and (inserting here, the name of the surveyor, or other person, by whom the same admeasurement shall have been made) having certified, that the said ship or vessel has (inserting here her number of decks) is, in length (inserting here the number of feet) in breadth (inserting here the number of feet) in depth (inserting here the number of feet) and measures (inserting here the number of tons:) And the said builder and (naming and describing the owner, or master, or agent for the owner or owners, as the case may be, by whom the said certificate shall have been countersigned) having agreed to the said description and admeasurement, the said ship or vessel has been recorded, in the district of (inserting here the name of the district, where recorded) in the United States; Witness my hand and seal, this (inserting here the day of the month) day of (inserting here the name of the month) in the year (inserting here the number of the year);" which certificate shall be recorded in the office of the said collector, and a duplicate thereof transmitted to the Register of the Treasury of the United States, to be recorded in his office.

Sec. 23. *And be it further enacted*, That if the master, or the name of any ship or vessel so recorded, shall be changed, the owner, part-owner, or consignee of such ship or vessel, shall cause a memorandum thereof to be endorsed on the certificate of the record, by the collector of the district, where such ship or vessel may be, or at which she shall first arrive, if such change took place in a foreign country; and a copy thereof shall be entered in the book of records, a transcript whereof shall be transmitted by the said collector, to the collector of the district, where such certificate was granted (if not the same person) who shall enter the same in his book of records, and forward a duplicate of such entry, to the Register of the Treasury of the United States; and in such case, until the said owner, part-owner, or consignee, shall cause the said memoran-

dum to be made, by the collector, in manner aforesaid, such ship or vessel shall not be deemed, or considered, as a vessel recorded, in pursuance of this act.

Sec. 24. *And be it further enacted*, That the master, or other person having the command or charge of any ship or vessel, recorded in pursuance of this act, shall, on entry of such ship or vessel, produce the certificate of such record, to the collector of the district, where she shall be so entered; in failure of which, the said ship or vessel, shall not be entitled to the privileges of a vessel, recorded as aforesaid: *Provided always, and be it further enacted*, That nothing herein contained shall be construed to make it necessary to record, a second time, any ship or vessel, which shall have been recorded, pursuant to the act, hereby in part repealed: but such recording shall be of the like force and effect, as if made, pursuant to this act.

Sec. 25. *And be it further enacted*, That the fees and allowances for the several services to be performed, pursuant to this act, and the distribution of the same, shall be as follows, to wit: For the admeasurement of every ship or vessel, of one hundred tons, and under, one cent per ton; for the admeasurement of every ship or vessel, above one hundred, and not exceeding two hundred tons, one hundred and fifty cents; for the admeasurement of every ship or vessel, above two hundred tons, two hundred cents; for every certificate of registry or record, two hundred cents; for every indorsement upon a certificate of registry or record, one hundred cents; and for taking every bond required by this act, twenty-five cents. The whole amount of which fees shall be received, and accounted for, by the collector, or at his option, by the naval-officer, where there is one: and where there is a collector, naval-officer, and surveyor, shall be equally divided, monthly, between the said officers; and where there is no naval-officer, two thirds to the collector, and the other third to the surveyor; and where there is only a collector, he shall receive the whole amount thereof; and where there is more than one surveyor in any district, each of them shall receive his proportionable part of such fees, as shall arise in the port, for which he is appointed: *Provided always*, that, in all cases, where the tonnage of any ship or vessel shall be ascertained, by any person appointed for that purpose, such person shall be paid a reasonable compensation therefor, out of the fees aforesaid, before any distribution

thereof, as aforesaid. And every collector and naval-officer, and every surveyor, who shall reside at a port where there is no collector, shall cause to be affixed, and constantly kept, in some conspicuous part of his office, a fair table of the rates of fees, demandable by this act.

Sec. 26. *And be it further enacted*, That every collector, or officer, who shall knowingly make or be concerned in making, any false register or record, or shall knowingly grant, or be concerned in granting, any false certificate of registry or record of, or for any ship or vessel, or other false document whatsoever, touching the same, contrary to the true intent and meaning of this act, or who shall designedly take any other, or greater fees, than are by this act allowed, or who shall receive any voluntary reward or gratuity, for any of the services performed, pursuant thereto; and every surveyor, or other person appointed to measure any ship or vessel, who shall wilfully deliver to any collector, or naval-officer, a false description of such ship or vessel, to be registered or recorded, shall, upon conviction of any such neglect, or offence, forfeit the sum of one thousand dollars, and be rendered incapable of serving in any office of trust or profit, under the United States; and if any person or persons, authorized and required by this act, in respect to his or their office or offices, to perform any act or thing, required to be done or performed, pursuant to any of the provisions of this act, shall wilfully neglect to do or perform the same, according to the true intent and meaning of this act, such person or persons shall, on being duly convicted thereof, if not subject to the penalty and disqualification aforesaid, forfeit the sum of five hundred dollars for the first offence, and a like sum for the second offence, and shall, thenceforth, be rendered incapable of holding any office of trust or profit under the United States.

Sec. 27. *And be it further enacted*, That if any certificate of registry, or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually intitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel, and furniture.

Sec. 28. *And be it further enacted*, That if any person or persons shall falsely make oath or affirmation, to any of the matters herein required to be verified, such person or persons shall suffer the like pains and penalties as shall be

incurred by persons committing wilful and corrupt perjury; and that if any person or persons shall forge, counterfeit, erase, alter, or falsify any certificate, register, record, or other document, mentioned, described or authorized, in and by this act, such person, or persons, shall, for every such offence, forfeit the sum of five hundred dollars.

Sec. 29. *And be it further enacted*, That all the penalties and forfeitures, which may be incurred, for offences against this act, shall and may be sued for, prosecuted and recovered, in such courts, and be disposed of, in such manner, as any penalties and forfeitures, which may be incurred, for offences against the act, intitled, "An act to provide more effectually for the collection of the duties imposed by law, on goods, wares and merchandize imported into the United States, and on the tonnage of ships or vessels," may legally be sued for, prosecuted, recovered and disposed of: *Provided always*, That if any officer entitled to a part, or share of any such penalty, or forfeiture, shall be necessary, as a witness, on the trial for such penalty or forfeiture, such officer may be a witness upon the said trial; but in such case, he shall not receive, nor be entitled to any part or share of the said penalty or forfeiture; and the part or share, to which he would otherwise have been entitled, shall accrue to the United States.

Sec. 30. *And be it further enacted*, That from and after the last day of March next, this act shall be in full force and effect; and so much of the act, intitled, "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," as comes within the purview of this act, shall, after the said last day of March, be repealed.

[*This act passed thirty-first December*, 1792.]

An Act for enrolling and licensing Ships or Vessels to be employed in the Coasting Trade and Fisheries, and for regulating the same.

Sec. 1. BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That ships or vessels, enrolled by virtue of "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," and those of twenty tons

and upwards, which shall be enrolled after the last day of May next, in pursuance of this act, and having a licence in force, or if less than twenty tons, not being enrolled shall have a licence in force, as is hereinafter required, and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries.

Sec. 2. *And be it further enacted*, That from and after the last day of May next, in order for the enrolment of any ship or vessel, she shall possess the same qualifications, and the same requisites, in all respects, shall be complied with, as are made necessary for registering ships or vessels, by the act, intitled, "An act concerning the registering and recording of ships or vessels," and the same duties and authorities are hereby given and imposed on all officers, respectively, in relation to such enrolments, and the same proceedings shall be had, in similar cases, touching such enrolments; and the ships or vessels so enrolled, with the master, or owner or owners thereof, shall be subject to the same requisites, as are in those respects provided for vessels registered by virtue of the aforesaid act; the record of which enrolment shall be made, and an abstract or copy thereof granted, as nearly as may be, in the form following: "Enrolment in conformity to an act of the Congress of the United States of America, intitled "An act for enrolling and licensing ships or vessels, to be employed in the coasting trade and fisheries, and for regulating the same" [inserting here the name of the person with his occupation and place of abode, by whom the oath or affirmation is to be made] having taken and subscribed the oath (or affirmation) required by this act, and having sworn (or affirmed) that he (or she, and if more than one owner, adding the words "together with," and the name or names, occupation or occupations, place or places of abode, of the owner or owners) is, (or are) a citizen (or citizens) of the United States, and sole owner (or owners) of the ship or vessel, called the [inserting here her name] of [inserting here the name of the port, to which she may belong] whereof [inserting here the name of the master] is at present master, and is a citizen of the United States, and that the said ship or vessel was [inserting here when and where built] and [inserting here the name and office, if any, of the person, by whom she shall have been surveyed, or admeasured] having certified, that the said ship or vessel

has [inserting here the number of decks] and [inserting here the number of masts] and that her length is [inserting here the number of feet] her breadth [inserting here the number of feet] her depth [inserting here the number of feet] and that she measures [inserting here her number of tons] that she is [describing here the particular kind of vessel, whether ship, brigantine, snow, schooner, sloop, or whatever else, together with her built, and specifying, whether she has any or no gallery or head] and the said [naming the owner, or the master, or other person acting in behalf of the owner or owners, by whom the certificate of admeasurement shall have been countersigned] having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said act, the said ship or vessel has been duly enrolled, at the port of [naming the port where enrolled.] Given under my hand and seal, at [naming the said port] this [inserting the particular day] day of [naming the month] in the year [specifying the number of the year, in words at length."]

Sec. 3. *And be it further enacted*, That it shall and may be lawful for the collectors of the several districts, to enroll and licence any ship or vessel, that may be registered, upon such registry being given up, or to register any ship or vessel, that may be enrolled, upon such enrolment and licence being given up. And when any ship or vessel shall be in any other district, than the one, to which she belongs, the collector of such district, on the application of the master or commander thereof, and upon his taking an oath or affirmation, that, according to his best knowledge and belief, the property remains, as expressed in the register or enrolment proposed to be given up, and upon his giving the bonds required for granting registers, shall make the exchanges aforesaid; but in every such case, the collector, to whom the register, or enrolment and licence may be given up, shall transmit the same to the register of the treasury; and the register, or enrolment and licence, granted in lieu thereof, shall, within ten days after the arrival of such ship or vessel within the district, to which she belongs, be delivered to the collector of the said district, and be by him cancelled. And if the said master or commander shall neglect to deliver the said register or enrolment and licence, within the time aforesaid, he shall forfeit one hundred dollars.

Sec. 4. *And be it further enacted*, That in order to the licensing of any ship or vessel, for carrying on the coasting trade or fisheries, the husband, or managing owner, together with the master thereof, with one or more sureties, to the satisfaction of the collector granting the same, shall become bound to pay to the United States, if such ship or vessel be of the burthen of five tons, and less than twenty tons, the sum of one hundred dollars; and if twenty tons, and not exceeding thirty tons, the sum of two hundred dollars; and if above thirty tons, and not exceeding sixty tons, the sum of five hundred dollars; and if above sixty tons, the sum of one thousand dollars; in case it shall appear, within two years from the date of the bond, that such ship or vessel has been employed in any trade, whereby the revenue of the United States has been defrauded during the time, the licence granted to such ship or vessel remained in force; and the master of such ship or vessel shall also swear, or affirm, that he is a citizen of the United States, and that such licence shall not be used for any oth- vessel, or any other employment, than that, for which it is specially granted, or in any trade or business, whereby the revenue of the United States may be defrauded; and if such ship or vessel be less than twenty tons burthen, the husband or managing owner shall swear or affirm, that she is wholly the property of a citizen or citizens of the United States; whereupon it shall be the duty of the collector of the district comprehending the port, whereto such ship or vessel may belong [the duty of six cents per ton, being first paid] to grant a licence, in the form following: "Licence for carrying on the [here insert, coasting trade, whale fishery, or cod fishery, as the case may be.]

"In pursuance of an act of the Congress of the United States of America, intitled, "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," (inserting here the name of the husband or managing owner, with his occupation and place of abode, and the name of the master, with the place of his abode) having given bond, that the (insert here the description of the vessel, whether ship, brigantine, snow, schooner, sloop, or whatever else she may be) called the (insert here the vessel's name) whereof the said (naming the master) is master, burthen (insert here the number of tons, in words) tons, as appears by her enrolment, dated at (naming the district, day, month, and

year, in words at length (but if she be less than twenty tons, insert, instead thereof) proof being had of her admeasurement, shall not be employed in any trade, while this licence shall continue in force, whereby the revenue of the United States shall be defrauded, and having also sworn (or affirmed) that this licence shall not be used for any other vessel, or for any other employment, than is herein specified, licence is hereby granted for the said (inserting here, the description of the vessel) called the (inserting here the vessel's name) to be employed in carrying on the (inserting here, coasting trade, whale fishery, or cod fishery, as the case may be) for one year from the date hereof, and no longer: Given under my hand and seal, at (naming the said district) this (inserting the particular day) day of (naming the month) in the year specifying the number of the year in words at length.")

Sec. 5. *And be it further enacted*, That no licence, granted to any ship or vessel, shall be considered in force, any longer than such ship or vessel is owned, and of the description set forth in such licence, or for carrying on any other business or employment, than that for which she is specially licenced, and if any ship or vessel be found, with a forged or altered licence, or making use of a licence granted for any other ship or vessel, such ship or vessel, with her tackle, apparel and the cargo found on board her, shall be forfeited.

Sec. 6. *And be it further enacted*, That after the last day of May next, every ship or vessel of twenty tons or upwards (other than such as are registered) found trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled and licenced, or if less than twenty tons, and not less than five tons, without a licence, in manner as is provided by this act, such ship or vessel, if laden with goods, the growth or manufacture of the United States only (distilled spirits excepted) or in ballast, shall pay the same fees and tonnage in every port of the United States, at which she may arrive, as ships or vessels not belonging to a citizen or citizens of the United States, and if she have on board any articles of foreign growth or manufacture, or distilled spirits, other than sea stores, the ship or vessel, together with her tackle, apparel and furniture, and the lading found on board, shall be forfeited: *Provided*, however, if such ship or vessel be at sea, at the expiration

of the time, for which the licence was given, and the master of such ship or vessel, shall swear or affirm, that such was the case, and shall also within forty-eight hours after his arrival deliver to the collector of the district in which he shall first arrive, the licence which shall have expired, the forfeiture aforesaid shall not be incurred, nor shall the ship or vessel be liable to pay the fees and tonnage aforesaid.

Sec. 7. *And be it further enacted*, That the collector of each district, shall progressively number the licences by him granted, beginning anew at the commencement of each year, and shall make a record thereof in a book, to be by him kept for that purpose, and shall, once in three months, transmit to the Register of the Treasury, copies of the licences, which shall have been so granted by him; and also of such licences, as shall have been given up or returned to him, respectively, in pursuance of this act. And where any ship or vessel shall be licenced, or enrolled anew, or being licenced or enrolled, shall afterwards be registered, or being registered, shall afterwards be enrolled, or licenced, she shall, in every such case, be enrolled, licenced or registered by her former name.

Sec. 8. *And be it further enacted*, That if any ship or vessel, enrolled or licenced, as aforesaid, shall proceed on a foreign voyage, without first giving up her enrolment and licence, to the collector of the district comprehending the port, from which she is about to proceed on such foreign voyage, and being duly registered by such collector, every such ship or vessel, together with her tackle, apparel and furniture, and the goods, wares and merchandize, so imported therein, shall be liable to seizure and forfeiture: *Provided always*, if the port, from which such ship or vessel is about to proceed on such foreign voyage, be not within the district, where such ship or vessel is enrolled, the collector of such district shall give to the master of such ship or vessel a certificate, specifying that the enrolment and licence of such ship or vessel is received by him, and the time when it was so received: which certificate shall afterwards be delivered by the said master to the collector, who may have granted such enrolment and licence.

Sec. 9. *And be it further enacted*, That the licence, granted to any ship or vessel, shall be given up to the collector of the district, who may have granted the same, within

three days after the expiration of the time, for which it was granted, in case such ship or vessel be then within the district, or if she be absent, at that time, within three days from her first arrival within the district afterwards, or if she be sold out of the district, within three days after the arrival of the master within any district, to the collector of such district taking his certificate therefor; and if the master thereof shall neglect, or refuse to deliver up the licence, as aforesaid, he shall forfeit fifty dollars; but if such licence shall have been previously given up to the collector of any other district, as authorized by this act, and a certificate thereof under the hand of such collector, be produced by such master, or if such licence be lost, or destroyed, or unintentionally mislaid, so that it cannot be found, and the master of such ship or vessel shall make and subscribe an oath or affirmation, that such licence is lost, destroyed, or unintentionally mislaid, as he verily believes, and that the same, if found, shall be delivered up, as is herein required, then the aforesaid penalty shall not be incurred. And if such licence shall be lost, destroyed, or unintentionally mislaid, as aforesaid, before the expiration of the time, for which it was granted, upon the like oath or affirmation being made and subscribed by the master of such ship or vessel, the said collector is hereby authorized and required, upon application being made therefor, to licence such ship or vessel anew.

Sec. 10. *And be it further enacted*, That it shall and may be lawful for the owner or owners of any licenced ship or vessel, to return such licence to the collector who granted the same, at any time within the year, for which it was granted, who shall thereupon, cancel the same, and shall licence such vessel anew, upon the application of the owner or owners, and upon the conditions herein before required, being complied with; and in case the term, for which the former licence was granted, shall not be expired an abatement of the tonnage of six cents per ton shall be made, in proportion of the time so unexpired.

Sec. 11. *And be it further enacted*, That every licensed ship or vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner as is provided for registered ships or vessels, and if any licensed ship or vessel be found, without such painting, the owner or owners thereof shall pay twenty dollars.

Sec. 12. *And be it further enacted*, That when the master

of any licensed ship or vessel, ferry boats excepted, shall be changed, the new master, or, in case of his absence, the owner, or one of the owners thereof, shall report such change to the collector, residing at the port where the same may happen, if there be one, otherwise, to the collector residing at any port, where such ship or vessel may next arrive, who, upon the oath or affirmation of such new master, or in case of his absence, of the owner or one of the owners, that he is a citizen of the United States, and that such ship or vessel shall not, while such license continues in force, be employed in any manner, whereby the revenue of the United States may be defrauded, shall endorse such change on the licence, with the name of the new master; and when any change shall happen, as aforesaid, and such change shall not be reported, and the endorsement made of such change, as is herein required, such ship or vessel, found carrying on the coasting trade or fisheries, shall be subject to pay the same fees and tonnage, as a vessel of the United States, having a register, and the said new master shall forfeit and pay the sum of ten dollars.

Sec. 13. *And be it further enacted*, that it shall be lawful at all times, for any officer concerned in the collection of the revenue, to inspect the enrolment or licence of any ship or vessel; and if the master of any such ship or vessel shall not exhibit the same, when thereunto required by such officer, he shall pay one hundred dollars.

Sec. 14. *And be it further enacted*, That the master or commander of every ship or vessel licenced for carrying on the coasting trade, destined from a district in one State to a district in the same, or an adjoining State on the sea coast, or on a navigable river, having on board, either distilled spirits in casks exceeding five hundred gallons, wine in casks exceeding two hundred and fifty gallons, or in bottles exceeding one hundred dozens, sugars in casks or boxes exceeding three thousand pounds, tea in chests or boxes exceeding five hundred pounds, coffee in casks or bags exceeding one thousand pounds, or foreign merchandize in packages, as imported, exceeding in value four hundred dollars, or goods, wares or merchandize, consisting of such enumerated or other articles of foreign growth or manufacture, or of both, whose aggregate value exceeds eight hundred dollars, shall, previous to the departure of such ship or vessel, from the port where she may then be, make out and subscribe duplicate manifests of the whole of

such cargo on board such ship or vessel, specifying in such manifests, the marks and numbers of every cask, bag, box, chest or package containing the same, with the name and place of residence of every shipper and consignee, and the quantity shipped by and to each, and if there be a collector or surveyor, residing at such port, or within five miles thereof, he shall deliver such manifests to the collector, if there be one, otherwise to the surveyor, before whom he shall swear or affirm, to the best of his knowledge and belief, that the goods therein contained were legally imported, and the duties thereupon paid or secured, or if spirits distilled within the United States, that the duties thereupon have been paid or secured, whereupon the said collector or surveyor shall certify the same on the said manifests, one of which he shall return to the said master, with a permit, specifying thereon, generally, the lading on board such ship or vessel, and authorizing him to proceed to the port of his destination. And if any ship or vessel, being laden and destined, as aforesaid, shall depart from the port where she may then be, without the master or commander having first made out and subscribed duplicate manifests of the lading on board such ship or vessel, and in case there be a collector or surveyor residing at such port, or within five miles thereof, without having previously delivered the same to the said collector or surveyor, and obtaining a permit, in manner as is herein required, such master or commander shall pay one hundred dollars.

Sec. 15. *And be it further enacted*, That the master or commander of every ship or vessel licenced for carrying on the coasting trade, having on board, either distilled spirits in casks exceeding five hundred gallons, wine in casks exceeding two hundred and fifty gallons, or in bottles exceeding one hundred dozens, sugar in casks or boxes exceeding three thousand pounds, tea in chests or boxes exceeding five hundred pounds, coffee in casks or bags exceeding one thousand pounds, or foreign merchandize in packages, as imported, exceeding in value four hundred dollars, or goods, wares, or merchandize, consisting of such enumerated or other articles of foreign growth, or manufacture, or of both, whose aggregate value exceeds eight hundred dollars, and arriving from a district in one State, at a district in the same or an adjoining State on the sea-coast, or on a navigable river, shall, previous to the unlading of any part of the cargo of such ship or vessel, deliver to the collector, if there be one, or if not, to the

surveyor residing at the port of her arrival, or if there be no collector or surveyor residing at such port, then to a collector or surveyor, if there be any such officer, residing within five miles thereof, the manifest of the cargo, certified by the collector or surveyor of the district from whence she sailed (if there be such manifest) otherwise the duplicate manifests thereof, as is herein before directed, to the truth of which, before such officer, he shall swear or affirm. And if there have been taken on board such ship or vessel, any other or more goods, than are contained in such manifest or manifests, since her departure from the port, from whence she first sailed, or if any goods have been since landed, the said master or commander shall make known and particularize the same to the said collector or surveyor, or if no such goods have been so taken on board or landed he shall so declare, to the truth of which he shall swear or affirm; Whereupon, the said collector or surveyor shall grant a permit for unlading a part, or the whole of such cargo, as the said master or commander may request. And if there be no collector or surveyor, residing at, or within five miles of the said port of her arrival, the master or commander of such ship or vessel may proceed to discharge the lading from on board such ship or vessel, but shall deliver to the collector or surveyor, residing at the first port, where he may next afterwards arrive, and within twenty-four hours of his arrival, the manifest or manifests aforesaid, noting thereon the times when, and places where, the goods, therein mentioned, have been unladen, to the truth of which, before the said last mentioned collector or surveyor, he shall swear or affirm; and if the master or commander of any such ship or vessel, being laden as aforesaid, shall neglect or refuse to deliver the manifest or manifests, at the times and in the manner, herein directed, he shall pay one hundred dollars.

Sec. 16. *And be it further enacted*, That the master or commander of every ship or vessel, licenced for carrying on the coasting trade, and being destined from any district of the United States, to a district other than a district in the same, or an adjoining State, on the sea-coast, or on a navigable river, shall, previous to her departure, deliver to the collector residing at the port where such ship or vessel may be, if there is one, otherwise to the collector of the district comprehending such port, or to a surveyor within the district, as the one or the other may re-

side nearest to the port at which such ship or vessel may be, duplicate manifests of the whole cargo on board such ship or vessel, or if there be no cargo on board, he shall so certify, and if there be any distilled spirits, or goods, wares and merchandize, of foreign growth or manufacture on board, other than what may, by the collector, be deemed sufficient for sea-stores, he shall specify in such manifests, the marks and numbers of every cask, bag, box, chest or package, containing the same, with the name and place of residence, of every shipper and consignee of such distilled spirits, or goods of foreign growth or manufacture, and the quantity shipped by, and to each, to be by him subscribed, and to the truth of which, he shall swear or affirm; and shall also swear or affirm, before the said collector or surveyor, that such goods, wares, or merchandize, of foreign growth or manufacture, were, to the best of his knowledge and belief, legally imported, and the duties thereupon paid, or secured; or if spirits distilled within the United States, that the duties thereupon, have been duly paid or secured; upon the performance of which, and not before, the said collector or surveyor shall certify the same on the said manifests; one of which he shall return to the master, with a permit, thereto annexed, authorizing him to proceed to the port of his destination. And if any such ship or vessel shall depart from the port where she may then be, having distilled spirits, or goods, wares, or merchandize, of foreign growth or manufacture on board, without the several things herein required, being complied with, the master thereof shall forfeit one hundred dollars; or if the lading be of goods, the growth or manufacture of the United States only, or if such ship or vessel have no cargo, and she depart, without the several things herein required, being complied with, the said master shall forfeit and pay fifty dollars.

Sec. 17. *And be it further enacted*, That the master or commander of every ship or vessel, licenced to carry on the coasting trade, arriving at any district of the United States, from any district, other than a district in the same, or an adjoining State on the sea-coast, or on a navigable river, shall deliver to the collector residing at the port where she may arrive, if there be one, otherwise to the collector or surveyor in the district comprehending such port, as the one or the other, may reside nearest thereto, if the collector or surveyor reside at a distance not exceeding five

miles, within twenty-four hours, or if at a greater distance, within forty-eight hours next after his arrival; and previous to the unlading any of the goods brought in such ship or vessel, the manifest of the cargo (if there be any) certified by the collector or surveyor of the district from whence she last sailed, and shall make oath or affirmation, before the said collector, or surveyor, that there was not, when he sailed from the district where his manifest was certified, or has been since, or then is, any more, or other goods, wares or merchandize of foreign growth or manufacture, or distilled spirits (if there be any, other than sea-stores, on board such vessel) than is therein mentioned; and if there be no such goods, he shall so swear or affirm; and if there be no cargo on board, he shall produce the certificate of the collector or surveyor of the district from whence she last sailed, as aforesaid, that such is the case: whereupon such collector or surveyor, shall grant a permit for unlading the whole, or part of such cargo (if there be any) within his district, as the master may request; and where a part only of the goods, wares and merchandize, of foreign growth or manufacture, or of distilled spirits, brought in such ship or vessel, is intended to be landed, the said collector or surveyor shall make an endorsement of such part, on the back of the manifest, specifying the articles to be landed; and shall return such manifest to the master, endorsing also thereon, his permission for such ship or vessel, to proceed to the place of her destination; and if the master of such ship or vessel shall neglect or refuse to deliver the manifest (or if she has no cargo, the certificate) within the time herein directed, he shall forfeit one hundred dollars, and the goods, wares and merchandize of foreign growth or manufacture, or distilled spirits found on board, or landed from such ship or vessel, not being certified, as is herein required, shall be forfeited, and if the same shall amount to the value of eight hundred dollars, such ship or vessel, with her tackle, apparel and furniture, shall be also forfeited.

Sec. 18. *And be it further enacted*, That nothing in this act contained shall be so construed, as to oblige the master or commander of any ship or vessel, licenced for carrying on the coasting trade, bound from a district in one State to a district in the same, or an adjoining State on the sea-coast, or on a navigable river, having on board goods, wares or merchandize, of the growth, product or manufac-

tures of the United States only (except distilled spirits) or distilled spirits, not more than five hundred gallons, wine in casks not more than two hundred and fifty gallons, or in bottles not more than one hundred dozens, sugar in casks or boxes, not more than three thousand pounds, tea in chests or boxes, not more than five hundred pounds, coffee in casks or bags, not more than one thousand pounds, or foreign merchandize in packages as imported, of not more value than four hundred dollars, or goods, wares or merchandize, consisting of such enumerated or other articles of foreign growth or manufacture, or of both, whose aggregate value shall be not more than eight hundred dollars, to deliver a manifest thereof, or obtain a permit, previous to her departure, or on her arrival within such district, to make any report thereof; but such master shall be provided with a manifest, by him subscribed, of the lading, of what kind soever, which was on board such ship or vessel, at the time of his departure from the district from which she last sailed, and if the same, or any part of such lading consists of distilled spirits, or goods, wares or merchandize, of foreign growth or manufacture, with the marks and numbers of each cask, bag, box, chest or package, containing the same, with the name of the shipper and consignee of each; which manifest shall be by him exhibited, for the inspection of any officer of the revenue, when, by such officer, thereunto required; and shall also inform such officer, from whence such ship or vessel last sailed, and how long she has been in port, when by him so interrogated. And if the master of such ship or vessel shall not be provided, on his arrival within any such district, with a manifest, and exhibit the same, as is herein required, if the lading of such ship or vessel consist wholly of goods, the produce or manufacture of the United States (distilled spirits excepted) he shall forfeit twenty dollars, or if there be distilled spirits or goods, wares or merchandize, of foreign growth or manufacture, on board, excepting what may be sufficient for sea-stores, he shall forfeit forty dollars; or if he shall refuse to answer the interrogatories truly, as is herein required, he shall forfeit the sum of one hundred dollars. And if any of the goods laden on board such ship or vessel, shall be of foreign growth or manufacture, or of spirits distilled within the United States, so much of the same, as may be found on board such ship or vessel, and which shall not be included in the manifest exhibited by such master, shall be forfeited.

Sec. 19. *And be it further enacted*, That it shall and may be lawful for the collector of the district of Pennsylvania, to grant permits for the transportation of goods, wares or merchandize of foreign growth or manufacture, across the State of New-Jersey, to the district of New-York or across the State of Delaware, to any district in the State of Maryland or Virginia; and for the collector of the district of New-York, to grant like permits for the transportation across the state of New-Jersey; and for the collector of any district of Maryland or Virginia, to grant like permits for the transportation across the State of Delaware, to the district of Pennsylvania: *Provided*, That every such permit shall express the name of the owner, or person sending such goods, and of the person or persons, to whom such goods shall be consigned, with the marks, numbers and description of the packages whether bale, box, chest, or otherwise, and the kind of goods contained therein, and the date, when granted; and the owner or person sending such goods, shall swear or affirm, that they were legally imported, and the duties thereupon paid or secured: *And provided also*, That the owner or consignee of all such goods, wares and merchandize, shall, within twenty-four hours after the arrival thereof, at the place to which they were permitted to be transported, report the same, to the collector of the district where they shall so arrive, and shall deliver up the permit accompanying the same, and if the owner or consignee aforesaid, shall neglect or refuse to make due entry of such goods within the time, and in the manner herein directed, all such goods, wares and merchandize shall be subject to forfeiture; and if the permit granted shall not be given up, within the time limited for making the said report, the person or persons to whom it was granted, neglecting or refusing to deliver it up, shall forfeit fifty dollars for every twenty-four hours it shall be withheld afterwards: *Provided*, That where the goods, wares and merchandize, to be transported in manner aforesaid, shall be of less value than eight hundred dollars, the said oath and permit shall not be deemed necessary, nor shall the owner or consignee be obliged to make report to the collector of the district where the said goods, wares and merchandize shall arrive.

Sec. 20. *And be it further enacted*, That when any ship or vessel of the United States, registered according to law, shall be employed in going from any one district in the

United States, to any other district, such ship or vessel, and the master or commander thereof, with the goods she may have on board, previous to her departure from the district, where she may be, and also, upon her arrival in any other district, shall be subject (except as to the payment of fees) to the same regulations, provisions, penalties and forfeitures, and the like duties are imposed on like officers, as is provided by the sixteenth and seventeenth sections of this act, for ships or vessels licenced for carrying on the coasting trade: *Provided however*, that nothing herein contained, shall be construed to extend to registered ships or vessels of the United States, having on board goods, wares, and merchandize of foreign growth or manufacture, brought into the United States, in such ship or vessel from a foreign port, and on which the duties have not been paid or secured according to law.

Sec. 21. *And be it further enacted*, That when any ship or vessel, licenced for carrying on the fishery, shall be intended to touch and trade at any foreign port or place, it shall be the duty of the master, commander, or owner, to obtain permission for that purpose, from the collector of the district where such ship or vessel may be, previous to her departure, and the master or commander of every such ship or vessel, shall deliver like manifests, and make like entries, both of the ship or vessel, and of the goods, wares or merchandize on board, within the same time, and under the same penalty, as by the laws of the United States, are provided for ships or vessels of the United States arriving from a foreign port. And if any ship or vessel, licenced for carrying on the fisheries, shall be found within three leagues of the coast, with goods, wares or merchandize of foreign growth or manufacture, exceeding the value of five hundred dollars, without having such permission, as is herein directed, such ship or vessel together with the goods, wares or merchandize of foreign growth or manufacture imported therein, shall be subject to seizure and forfeiture.

Sec. 22. *And be it further enacted*, That the master or commander of every ship or vessel, employed in the transportation of goods from district to district, that shall put into a port other than the one to which she was bound, shall, within 24 hours of his arrival, if there be an officer residing at such port, and she continue there so long, make report of his arrival, to such officer, with the name of the

place he came from, and to which he is bound, with an account of his lading; and if the master of such ship or vessel shall neglect or refuse to do the same, he shall forfeit twenty dollars.

Sec. 23. *And be it further enacted*, That if the master or commander of any ship or vessel, employed in the transportation of goods from district to district, having on board goods, wares, or merchandize of foreign growth or manufacture, or distilled spirits, shall on his arrival at the port to which he was destined, have lost or mislaid the certified manifest of the same, or the permit which was given therefor, by the collector or surveyor of the district from whence he sailed, the collector of the district where he shall so arrive, shall take bond for the payment of the duties on such goods, wares and merchandize of foreign growth or manufacture, or distilled spirits, within six months, in the same manner, as though they were imported from a foreign country: *Provided however*, such bond shall be cancelled, if the said master shall deliver, or cause to be delivered to the collector taking such bond, and within the term therein limited for payment, a certificate from the collector or surveyor of the district, from whence he sailed, that such goods were legally exported in such ship or vessel, from such district.

Sec. 24. *And be it further enacted*, That the master or commander of every foreign ship or vessel, bound from a district in the United States, to any other district within the same, shall, in all cases, previous to her departure from such district, deliver to the collector of such district, duplicate manifests of the lading on board such ship or vessel, if there be any, or if there be none, he shall declare that such is the case, and to the truth of such manifests or declaration, he shall swear or affirm, and also obtain a permit, from the said collector, authorizing him to proceed to the place of his destination. And the master or commander of every such ship or vessel, on his arrival within any district, from any other district, shall, in all cases, within forty eight hours after his arrival, and previous to the unlading any goods from on board such ship or vessel, deliver to the collector of the district where he may have arrived, a manifest of the goods laden on board such ship or vessel, if any there be, or if in ballast only, he shall so declare, and to the truth of which manifest or declaration, he shall swear or affirm; and also, that such manifest contains an

account of all the goods, wares, and merchandize which were on board such ship or vessel, at the time, or have been since her departure from the place, from whence she shall be reported last to have sailed; and he shall also deliver to such collector the permit which was given him from the collector of the district from whence he sailed. And if the master or commander of any such ship or vessel shall neglect or refuse complying with any of the requirements herein made, he shall forfeit one hundred dollars: *Provided always*, That nothing herein contained shall be construed as affecting the payment of tonnage, or any other requirements which such ships or vessels are now subject to by the present existing laws of the United States.

Sec. 25. *And be it further enacted*, That in every case, where the collector is, by this act, directed to grant any enrolment, licence, certificate, permit, or other document, the naval-officer residing at the port (if there be one) shall sign the same, and every surveyor who shall certify a manifest, or grant a permit, or who shall receive any certified manifest, or a permit as is provided for in this act, shall make monthly returns thereof, or sooner, if it can conveniently be made, to the collector of the district where such surveyor may reside.

Sec. 26. *And be it further enacted*, That before any ship or vessel, of the burthen of five tons, and less than twenty tons, shall be licenced, the same admeasurement shall be made of such ship or vessel, and the same provisions observed relative thereto, as are to be observed in case of admeasuring ships or vessels to be registered or enrolled; but in all cases, where such ship or vessel, or any other licenced ship or vessel, shall have been once admeasured, it shall not be necessary to measure such ship or vessel anew, for the purpose of obtaining another enrolment or licence, except such ship or vessel shall have undergone some alteration as to her burthen, subsequent to the time of her former licence.

Sec. 27. *And be it further enacted*, That it shall be lawful for any officer of the revenue, to go on board of any ship or vessel, whether she shall be within or without his district, and the same to inspect, search and examine, and if it shall appear, that any breach of the laws of the United States has been committed, whereby such ship or vessel, or the goods, wares and merchandize on board, or any part thereof, is, or are liable to forfeiture, to make seizure of the same.

Sec. 28. *And be it further enacted*, That in every case, where a forfeiture of any ship or vessel, or of any goods, wares or merchandize, shall accrue, it shall be the duty of the collector, or other proper officer, who shall give notice of the seizure of such ship or vessel, or of such goods, wares or merchandize, to insert in the same advertisement, the name or names, and the place or places of residence, of the person or persons, to whom any such ship or vessel, goods, wares and merchandize belonged, or were consigned, at the time of such seizure, if the same shall be known to him.

Sec. 29. *And be it further enacted*, That every collector, who shall knowingly make any record of enrolment or licence of any ship or vessel, and every other officer, or person, appointed by, or under them, who shall make any record, or grant any certificate, or other document whatever, contrary to the true intent and meaning of this act, or shall take any other, or greater fees, than are, by this act, allowed, or shall receive, for any service performed, pursuant to this act, any reward or gratuity, and every surveyor, or other person appointed to measure ships or vessels, who shall wilfully deliver to any collector, or naval-officer, a false description of any ship or vessel, to be enrolled or licenced, in pursuance of this act, shall, upon conviction of any such neglect or offence, forfeit to the United States five hundred dollars, and be rendered incapable of serving in any office of trust or profit, under the United States. And if any person, authorized and required by this act, in respect to his office, to perform any act, or thing required by this act, shall wilfully neglect or refuse to do and perform the same, according to the true intent and meaning of this act, such person, on being duly convicted thereof, if not hereby subject to the penalty and disqualifications aforesaid, shall forfeit and pay the sum of five hundred dollars for the first offence, and a like sum for the second offence, and shall from thence forward, be rendered incapable of holding any office of trust or profit under the United States.

Sec. 30. *And be it further enacted*, That if any person or persons, shall swear or affirm to any of the matters, herein required to be verified, knowing the same to be false, such person or persons shall suffer the like pains and penalties as shall be incurred by persons committing wilful and corrupt perjury. And if any person or persons shall forge,

counterfeit, erase, alter or falsify any enrolment, licence, certificate, permit, or other document, mentioned or required in this act, to be granted by any officer of the revenue, such person or persons, so offending shall forfeit five hundred dollars.

Sec. 31. *And be it further enacted*, That if any person or persons shall assault, resist, obstruct, or hinder any officer in the execution of this act, or of any other act or law of the United States, herein mentioned, or of any of the powers or authorities vested in him by this act, or any other act or law, as aforesaid, all and every person and persons so offending, shall, for every such offence, for which no other penalty is particularly provided, forfeit five hundred dollars.

Sec. 32. *And be it further enacted*, That if any licenced ship or vessel shall be transferred in whole, or in part, to any person, who is not, at the time of such transfer, a citizen of, and resident within the United States, or if any such ship or vessel, shall be employed in any other trade than that for which she is licenced, or shall be found with a forged or altered licence, or one granted for any other ship or vessel, every such ship or vessel, with her tackle, apparel and furniture, and the cargo found on board her, shall be forfeited.

Sec. 33. *Provided nevertheless, and be it further enacted*, That in all cases where the whole or any part of the lading, or cargo on board, any ship or vessel, shall belong bona-fide to any person or persons other than the master, owner, or mariners, of such ship or vessel, and upon which the duties shall have been previously paid or secured, according to law, shall be exempted from any forfeiture under this act, any thing therein contained to the contrary notwithstanding.

Sec. 34. *And be it further enacted*, That the fees and allowances for the several duties and services, to be performed, in virtue of this act, shall be as follows; that is to say:

For admeasuring every ship or vessel, in order to the enrolment, or licencing and recording the same, if of the burthen of five tons, and less than twenty tons, fifty cents; if of twenty tons, and not exceeding seventy tons, seventy-five cents; if above seventy tons, and not exceeding one hundred tons, one hundred cents; if above one hundred tons, one hundred and fifty cents:

For every certificate of enrolment, fifty cents:

For every endorsement on a certificate of enrolment, twenty cents:

For every licence, and granting the same, including the bond, if not exceeding twenty tons, twenty-five cents; if above twenty, and not more than one hundred tons, fifty cents; and if more than one hundred tons, one hundred cents:

For every endorsement on a licence, twenty cents:

For certifying manifests, and granting a permit for a licenced vessel, to proceed from district to district, twenty-five cents, if less than fifty tons, and if above fifty tons, fifty cents:

For receiving a certified manifest, and granting a permit, on the arrival of such vessel, twenty-five cents, if less than fifty tons, and if above fifty tons, fifty cents:

For certifying manifests, and granting a permit for a registered vessel, to proceed from district to district, one hundred and fifty cents:

For receiving a certified manifest, and granting a permit, on the arrival of such registered vessel, one hundred and fifty cents:

For granting a permit for a vessel, not belonging to a citizen or citizens of the United States, to proceed from district to district, and receiving the manifest, two hundred cents:

For receiving a manifest, and granting a permit, to unload, for such last mentioned vessel, on her arrival in one district from another district, two hundred cents:

For granting a permit for a vessel carrying on the fishery, to trade at a foreign port, twenty-five cents, and for the report and entry of any foreign goods, imported in such vessel, twenty-five cents.

And where a surveyor shall certify a manifest, or grant a permit, or receive a certified manifest, and grant a permit, the fees arising therefrom, shall be received by him solely for his use. And all other fees arising, by virtue of this act, shall be received, and accounted for, by the collector, or, at his option, by the naval officer, where there is one, and where there is a collector, naval officer, and surveyor, shall be equally divided, monthly, between the said officers; and where there is no naval-officer, two thirds to the collector, and the other third to the surveyor; and and where there is only a collector, he shall receive the whole amount thereof; and where there is more than

one surveyor in any district, each of them shall receive his proportionable part of such fees, as shall arise in the port, for which he is appointed: *Provided always*, That in all cases, where the tonnage of any ship or vessel, shall be ascertained, by any person appointed for that purpose, such person shall be paid a reasonable compensation therefor, out of the fees aforesaid, before any distribution thereof, as aforesaid; and every collector and naval-officer, and every surveyor, who shall reside at a port where there is no collector, shall cause to be affixed, and constantly kept, in some conspicuous place of his office, a fair table of the rates of fees, demandable by this act.

Sec. 35. *And be it further enacted*, That all penalties and forfeitures, which shall be incurred by virtue and force of this act, shall and may be sued for, prosecuted and recovered, in like manner, as penalties and forfeitures, incurred by virtue of the act, intitled "An act to regulate the collection of the duties imposed by law on goods, wares and merchandize imported into the United States, and on the tonnage of ships or vessels," may be sued for, prosecuted and recovered, and shall be appropriated in like manner: *Provided always*, That if any officer, entitled to a part or share of any such penalty or forfeiture, shall be necessary as a witness on the trial for such penalty or forfeiture, such officer may be a witness upon the said trial; but in such case, he shall not receive, or be entitled to any part or share of the said penalty or forfeiture, and the part or share to which he would otherwise have been entitled, shall accrue to the United States.

Sec. 36. *And be it further enacted*, That this act shall commence and take effect, from and after the last day of May next, and thenceforth, the act intitled, "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," and also, the act, intitled, "An act to explain and amend an act, intitled "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," shall be repealed, and cease to operate, except as to the validity of the registers, records, enrollments and licences, with the certificates and documents, which shall have been done or granted, in pursuance of those acts, prior to the first day of June next, which shall continue to be of the like force and effect, as if the said acts were not repealed; and except also, as to the prosecution, recovery and distribution of, and for fines,

penalties and forfeitures, which may have been incurred, prior to the first day of June next, for which purpose likewise, the said acts shall continue in force.

Sec. 37. *And be it further enacted*, That nothing in this act, shall be construed to extend to any boat or lighter, not being masted, or if masted, and not decked, employed in the harbor of any town or city.

[*This act passed February eighteen*, 1793.]

An Act providing Passports for the Ships and Vessels of the United States.

Sec. 1. Be *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That it shall be the duty of the Secretary of State, to prepare a form, which, when approved by the President, shall be deemed the form of a passport for ships and vessels of the United States.

Sec. 2. *And be it further enacted*, That every ship and vessel of the United States, going to any foreign country, shall, before she departs from the United States, at the request of the master, be furnished by the collector for the district, where such ship or vessel may be, with a passport of the form prescribed and established, pursuant to the foregoing section; for which passport, the master of such ship or vessel, shall pay to the said collector, ten dollars, to be accounted for by him; and in order to be entitled to such passport, the master of every such ship or vessel shall be bound with sufficient sureties to the Treasurer of the United States, in the penalty of two thousand dollars, conditioned, that the said passport shall not be applied to the use or protection of any other ship or vessel, than the one described in the same; and that, in case of the loss or sale of any ship or vessel having such passport, the same shall, within three months, be delivered up to the collector from whom it was received, if the loss or sale take place within the United States; or within six months, if the same shall happen at any place nearer than the Cape of Good Hope: and within eighteen months, if at a more distant place.

Sec. 3. *And be it further enacted*, That there shall be paid on every ship and vessel of the United States sailing or trading to any foreign country, other than some port or

place in America, for each and every voyage, the sum of four dollars, to be received and accounted for, by the collector, at the time of clearing outward, if such vessel be bound direct to such foreign country, from any port of the United States, or at the time of entry in the United States, if such ship or vessel shall have sailed to such foreign country, from any port or place in America, other than of the United States.

Sec. 4. *And be it further enacted*, That if any ship or vessel of the United States, shall depart therefrom, after the first day of September next, and shall be bound to any foreign country, other than to some port or place in America, without such pass-port, the master of such ship or vessel, shall forfeit and pay the sum of two hundred dollars for every such offence.

[*This act passed June first*, 1796.]

An Act, in addition to an act, entitled, "an act concerning the registering and recording of ships or vessels," and to an act, entitled "an act for enrolling and licensing ships or vessels employed in the coasting trade and fisheries, and for regulating the same."

BE *it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever it shall appear, by satisfactory proof, to the Secretary of the Treasury, that any ship or vessel hath been sold and transferred by process of law; and that the register, certificate of enrolment, or licence, as the case may be, of such ship or vessel, is retained by the former owners, it shall be lawful for the said Secretary, to order and direct the collector of the district to which such ship or vessel may belong, to grant a new register, certificate of enrolment, or licence, as the case may be, on the owners, under such sale, complying with such terms and conditions, as are, by law, required for granting of such papers; excepting only the delivering up of the former certificate of registry, enrolment or licence, as the case may be: *Provided nevertheless*, That nothing in this act contained, shall be construed to remove the liability of any person or per-

sons to any penalty for not surrendering up the papers, belonging to any ship or vessel, on a transfer or sale of the same.

[*This act passed March second*, 1797.]

An Act, in addition to an Act, entitled "An Act concerning the registering and recording of Ships and Vessels."

BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That no ship or vessel which has been or shall be registered, pursuant to any law of the United States, and which hereafter shall be seized, or captured and condemned, under the authority of any foreign power, or that shall by sale become the property of a foreigner or foreigners, shall, after the passing of this act, be entitled to, or capable of receiving a new register, notwithstanding such ship or vessel should afterwards become American property; but that all such ships and vessels shall be taken and considered, to all intents and purposes, as foreign vessels: Provided, that nothing in this act contained, shall extend to, or be construed to affect the person or persons owning any ship or vessel, at the time of the seizure, or capture of the same, or shall prevent such owner, in case he regain a property in such ship or vessel, so condemned, by purchase or otherwise, from claiming and receiving a new register for the same, as he might or could have done, if this act had not been passed.

[*This act passed June twenty-seventh*, 1797.]

An Act supplementary to the act entitled "An act providing passports for the ships and vessels of the United States."

BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That every unregistered ship or vessel owned by a citizen or citizens of the United States, and sailing with a sea-letter, going to any foreign country, shall, before she departs

from the United States, at the request of the master, be furnished by the collector of the district where such vessel may be, with a passport of the form prescribed and established by the act to which this is a supplement, for which the master shall pay to the collector ten dollars, and be subject to the rules and conditions prescribed in the said act, for ships and vessels of the United States.

Sec. 2. *And be it further enacted*, That there shall be paid on every such unregistered ship or vessel, sailing or trading to any foreign country, other than some port or place in America, for each and every voyage, the same sum at the time of clearing outwards, to be received and accounted for in the same manner as is by said act required in cases of ships and vessels of the United States.

[*This act passed March second*, 1803.]

An act in addition to the act, entitled "An act concerning the registering and recording of ships and vessels of the United States," and to the act, entitled "An act to regulate the collection of duties on imports and tonnage."

BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That if any person shall knowingly make, utter, or publish any false sea letter, Mediterranean passport, or certificate of registry, or shall knowingly avail himself of any such Mediterranean passport, sea letter, or certificate of registry, he shall forfeit and pay a sum not exceeding five thousand dollars, to be recovered by action of debt, in the name of the United States, in any court of competent jurisdiction; and if an officer of the United States, he shall forever thereafter be rendered incapable of holding any office of trust or profit, under the authority of the United States.

Sec. 2. *And be it further enacted*, That it shall be the duty of the comptroller of the Treasury, to cause to be provided, blank certificates of registry, with such water and other secret marks as he may direct, which marks shall be made known only to the collectors and their deputies, and to the consuls or commercial agents of the United States;

and from and after the thirty-first day of December next, no certificate of registry shall be issued, except such as shall have been provided and marked as aforesaid; and the ships or vessels of the United States, which shall have been duly registered as such, shall be entitled to new certificates of registry (gratis) in exchange for their old certificates of registry: And it shall be the duty of the respective collectors, on the departure of any such ship or vessel, after the said thirty-first day of December, from the district to which such ship or vessel shall belong, to issue a new certificate accordingly, and to retain and deface the former certificate.

Sec. 3. *And be it further enacted*, That when any ship or vessel, which has been, or which shall be registered pursuant to any law of the United States, shall whilst such ship or vessel is without the limits of the United States, be sold or transferred in whole or in part to a citizen or citizens of the United States, such ship or vessel on her first arrival in the United States thereafter, shall be entitled to all the privileges and benefits of a ship or vessel of the United States: *Provided*, That all the requisites of law, in order to the registry of ships or vessels, shall be complied with, and a new certificate of registry obtained for such ship or vessel, within three days from the time at which the master or other person having the charge or command of such ship or vessel, is required to make his final report upon her first arrival afterwards as aforesaid, agreeably to the thirtieth section of the act, passed on the second day of March, one thousand seven hundred and ninety-nine, entitled, "An act to regulate the collection of duties on imports and tonnage." And it shall be lawful to pay to the collector of the district within which such ship or vessel may arrive as aforesaid, the duties imposed by law on the tonnage of such ship or vessel, at any time within three days from the time at which the master or other person having the charge or command of such ship or vessel, is required to make his final report as aforesaid, any thing to the contrary in any former law notwithstanding: *Provided always*, That nothing herein contained shall be construed to repeal, or in any wise change the provisions, restrictions or limitations of any former act or acts, excepting so far as the same shall be repugnant to the provisions of this act.

Sec. 4. *And be it further enacted*, That the power vested in the secretary of the treasury, to remove disabilities in-

curred under the act to which this is a supplement, and under the act, entitled, "An act for enrolling and licensing ships or vessels, to be employed in the coasting trade and fisheries, and for regulating the same," shall extend to the remission of any foreign duties, which shall have been or shall be incurred by reason of such disabilities.

[*This act passed March second*, 1803.]

An act to amend the act, entitled "An act concerning the registering and recording of ships and vessels."

BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That no ship or vessel shall be entitled to be registered as a ship or vessel of the United States, or if registered, to the benefits thereof, if owned in whole or in part by any person naturalized in the United States, and residing for more than one year in the country from which he originated, or for more than two years in any foreign country, unless such person be in the capacity of a consul or other public agent of the United States: *Provided*, That nothing herein contained shall be construed to prevent the registering anew of any ship or vessel before registered, in case of a *bona fide* sale thereof to any citizen or citizens resident in the United States: *And provided also*, That satisfactory proof of the citizenship of the person on whose account a vessel may be purchased, shall be first exhibited to the collector, before a new register shall be granted for such vessel.

Sec. 2. *And be it further enacted*, That the proviso in the act, entitled "An act in addition to an act, entitled "An act concerning the registering and recording of ships and vessels," passed the twenty seventh of June, one thousand seven hundred and ninety-seven, shall be taken and deemed to extend to the executors or administrators of the owner or owners of vessels, in the said proviso described.

[*This act passed March twenty-seventh*, 1804.]

No. XII.

An Act for the Government and Regulation of Seamen in the Merchants' Service.

Sec. 1. BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That from and after the first day of December next, every master or commander of any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining State, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such ship or vessel (except such as shall be apprentice or servant to himself or owners) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel shall carry out any seaman or mariner (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seamen and mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping: *Provided* such seaman or mariner shall perform such voyage: or if not, then for such time as he shall continue to do duty on board such ship or vessel; and shall moreover forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States: and such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures contained in this act.

Sec. 2. *And be it enacted,* That at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall so ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which he has shipped, at the time mentioned in such memorandum, and if the master,

commander, or other officer of the ship or vessel, shall on the day on which such neglect happened, make an entry in the log-book of such ship or vessel, of the name of such seaman or mariner, and shall in like manner note the time that he so neglected to render himself (after the time appointed); every such seaman or mariner shall forfeit for every hour which he shall so neglect to render himself, one day's pay, according to the rate of wages agreed upon, to be deducted out of his wages. And if any such seaman or mariner shall wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner or consignee of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced, both which sums shall be recoverable in any court, or before any justice or justices of any State, city, town or county within the United States, which, by the laws thereof, have cognizance of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage.

Sec. 3. *And be it enacted*, That if the mate or first officer under the master, and a majority of the crew of any ship or vessel, bound on a voyage to any foreign port, shall, after the voyage is begun (and before the ship or vessel shall have left the land) discover that the said ship or vessel is too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions or stores, to proceed on the intended voyage, and shall require such unfitness to be inquired into, the master or commander shall upon the request of said mate (or other officer) and such majority, forthwith proceed to or stop at the nearest or most convenient port or place where such enquiry can be made, and shall there apply to the judge of the district court, if he shall there reside, or if not, to some justice of the peace of the city, town or place, taking with him two or more of the said crew who shall have made such request; and thereupon such judge or justice is hereby authorized and required to issue his precept directed to three persons in the neighbourhood, the most skilful in maritime affairs that can be procured, requiring them to repair on board such ship or vessel, and to examine the same

in respect to the defects and insufficiences complained of, and to make report to him the said judge or justice, in writing under their hands, or the hands of two of them, whether in any, or in what respect the said ship or vessel is unfit to proceed on the intended voyage, and what addition of men, provisions or stores, or what repairs or alterations in the body, tackle or apparel will be necessary: and upon such report the said judge or justice shall adjudge and determine, and shall endorse on the said report, his judgment, whether the said ship or vessel is fit to proceed on the intended voyage; and if not, whether such repairs can be made or deficiencies supplied where the ship or vessel then lays, or whether it be necessary for the said ship or vessel to return to the port from whence she first sailed, to be there refitted; and the master and crew shall in all things conform to the said judgment; and the master or commander shall, in the first instance, pay all the costs of such view, report and judgment, to be taxed and allowed on a fair copy thereof, certified by the said judge or justice. But if the complaint of the said crew shall appear upon the said report and judgment, to have been without foundation, then the said master, or the owner or consignee of such ship or vessel, shall deduct the amount thereof, and of reasonable damages for the detention (to be ascertained by the said judge or justice) out of the wages growing due to the complaining seamen or mariners. And if after such judgment, such ship or vessel is fit to proceed on her intended voyage, or after procuring such men, provisions, stores, repairs or alterations as may be directed, the said seamen or mariners, or either of them, shall refuse to proceed on the voyage, it shall and may be lawful for any justice of the peace, to commit by warrant under his hand and seal, every such seaman or mariner (who shall so refuse) to the common gaol of the county, there to remain without bail or mainprize, until he shall have paid double the sum advanced to him at the time of subscribing the contract for the voyage, together with such reasonable costs as shall be allowed by the said justice, and inserted in the said warrant, and the surety or sureties of such seaman or mariner (in case he or they shall have given any) shall remain liable for such payment; nor shall any such seaman or mariner be discharged upon any writ of habeas corpus or otherwise, until such sum be paid by him or them, or his or their surety or sureties, for want of any

form of commitment, or other previous proceedings. *Provided*, That sufficient matter shall be made to appear, upon the return of such habeas corpus, and an examination then to be had, to detain him for the causes herein before assigned

Sec. 4. *And be it enacted*, That if any person shall harbor or secrete any seaman or mariner, belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof, before any court in the city, town or county, where he, she or they may reside, shall forfeit and pay ten dollars for every day which he, she or they shall continue so to harbor or secrete such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and no sum exceeding one dollar, shall be recoverable from any seaman or mariner, by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged shall be ended.

Sec. 5. *And be it enacted*, That if any seaman or mariner, who shall have subscribed such contract, as is herein before described, shall absent himself from on board the ship or vessel in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days pay for every day which he shall so absent himself, to be deducted out of his wages: but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and moreover shall be liable to pay to him or them all damages which he or they may sustain, by being obliged to hire other seamen or mariners in his or their place, and such damages shall be recovered with costs, in any court or before any justice or justices, having jurisdiction of the recovery of debts to the value of ten dollars or upwards.

Sec. 6. *And be it enacted*, That every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they belong, one third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo, before the voyage be ended, unless the contrary be expressly stipulated in the contract: and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract: and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then, for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to shew cause why process should not issue against such ship or vessel, her tackle, furniture and apparel, according to the course of admiralty-courts, to answer for the said wages: and if the master shall neglect to appear, or appearing, shall not shew that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint, whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of admiralty courts in such cases used; and in such suit all the seamen or mariners (having cause of complaint of the like kind, against the same ship or vessel) shall be joined as complainants; and it shall be incumbent on the master or commander, to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law, for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction,

wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast.

Sec. 7. *And be it enacted*, That if any seaman or mariner, who shall have signed a contract to perform a voyage, shall at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of peace, within the United States (upon the complaint of the master) to issue his warrant to apprehend such deserter, and bring him before such justice; and if it shall then appear by due proof, that he has signed a contract within the intent and meaning of this act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the house of correction or common gaol of the city, town or place, there to remain until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner.

Sec. 8. *And be it enacted*, That every ship or vessel belonging to a citizen or citizens of the United States, of the burthen of one hundred and fifty tons or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine-chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner.

Sec. 9. *And be it enacted*, That every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under decks, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship bread, for every person on board such ship or vessel, over and besides such other provisions, stores and live stock as shall, by the master or passengers be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance in water, flesh or bread, during the voyage, the master or owner of such ship or vessel, shall pay to each of the crew, one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance, to be recovered in the same manner as their stipulated wages.

[*This act passed July twentieth*, 1790.]

An Act to amend the act, entitled "An act for the government and regulation of seamen in the merchants' service."

BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That all the provisions, regulations, and penalties which are contained in the eighth section of the act, entitled "An act for the government and regulation of seamen in the merchants' service," so far as relates to a chest of medicines to be provided for vessels of one hundred and fifty tons burthen, and upwards, shall be extended to all merchant vessels of the burthen of seventy five tons, or upwards, navigated with six persons or more, in the whole, and bound from the United States to any port or ports in the West Indies.

[*This act passed March second*, 1805.]

An Act concerning certain Fisheries of the United States, and for the Regulation and Government of the Fishermen employed therein.

Sec. 1. BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*,

That the allowance now made upon the exportation of dried fish of the fisheries of the United States, in lieu of a drawback of the duties paid on the salt used in preserving the same, shall cease on all dried fish exported after the tenth day of June next, and as a commutation and equivalent therefor, there shall be afterwards paid on the last day of December annually, to the owner of every vessel or his agent, by the collector of the district where such vessel may belong, that shall be qualified agreeably to law, for carrying on the bank and other cod fisheries, and that shall actually have been employed therein at sea for the term of four months at the least, of the fishing season, next preceding which season is accounted to be from the last day of February to the last day of November in every year, for each and every ton of such vessel's burthen according to her admeasurement as licensed or enrolled, if of twenty tons and not exceeding thirty tons, one and an half dollars; and if above thirty tons, two and an half dollars; of which allowance aforesaid, three-eighth parts shall accrue and belong to the owner of such fishing vessel, and the other five eighths thereof shall be divided by him, his agent or lawful representative, to and among the several fishermen who shall have been employed in such vessel during the season aforesaid, or a part thereof, as the case may be, in such proportions as the fish they shall respectively have taken may bear to the whole quantity of fish taken on board such vessel during such season: *Provided*, That the allowance aforesaid on any one vessel, for one season, shall not exceed one hundred and seventy dollars.

Sec. 2. *And be it further enacted*, That on the last day of December annually, as aforesaid, there shall also be paid to the owner of every fishing boat or vessel of more than five tons, and less than twenty tons, or to his agent or lawful representative, by the collector of the district where such boat or vessel may belong, the sum of one dollar upon every ton admeasurement of such boat or vessel; which allowance shall be accounted for as part of the proceeds of the fares of said boat or vessel, and shall accordingly be so divided among all persons interested therein: *Provided however*, That this allowance, shall be made only to such boats or vessels as shall have actually been employed at sea in the cod fishery for the term of four months at the least of the preceding season: *And provided also*, That such

boat or vessel shall have landed in the course of said preceding season, a quantity of fish not less than twelve quintals for every ton of her admeasurement; the said quantity of fish to be ascertained when dried and cured fit for exportation, and according to the weight thereof, as the same shall weigh at the time of delivery when actually sold; which account of the weight, with the original adjustment and settlement of the fare or fares among the owners and fishermen, together with a written account of the length, breadth and depth of said boat or vessel, and the time she has actually been employed in the fishery in the preceding season, shall in all cases be produced and sworn or affirmed to, before the said collector of the district, in order to entitle the owner, his agent or lawful representative, to receive the allowance aforesaid. And if at any time within one year after payment of such allowance, it shall appear that any fraud or deceit has been practised in obtaining the same, the boat or vessel upon which such allowance shall have been paid, if found within the district aforesaid, shall be forfeited; otherwise the owner or owners having practised such fraud or deceit, shall forfeit and pay one hundred dollars; to be sued for, recovered and appropriated in like manner as forfeitures and penalties are to be sued for recovered and appropriated for any breach of an act, entitled, "An act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandize imported into the United States, and on the tonnage of ships or vessels."

Sec. 3. *And be it further enacted*, That the owner or owners of every fishing vessel of twenty tons and upwards, his or their agent or lawful representative, shall previous to receiving the allowance which is provided for in this act, produce to the collector who is authorized to pay the same, the original agreement or agreements which may have been made with the fishermen employed on board such vessel, as is herein before required, and also a certificate to be by him or them subscribed, therein mentioning the particular days on which such vessel sailed and returned on the several voyages or fares, she may have made in the preceding fishing season, to the truth of which they shall swear or affirm before the collector aforesaid.

Sec. 4. *And be it further enacted*, That no ship or vessel of twenty tons or upwards, employed as aforesaid, shall be entitled to the allowance granted by this act, unless the

skipper or master thereof shall, before he proceeds on any fishing voyage, make an agreement in writing or in print, with every fisherman employed therein, excepting only any apprentice or servant of himself or owner; and in addition to such terms of shipment as may be agreed on, shall in such agreement express whether the same is to continue for one voyage or for the fishing season, and shall also express that the fish or the proceeds of such fishing voyage, or voyages which may appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish they may respectively have caught; which agreement shall be endorsed or countersigned by the owner of such fishing vessel, or his agent: And if any fisherman having engaged himself for a voyage or for the fishing season, in any fishing vessel, and signed an agreement therefor as aforesaid, shall thereafter and while such agreement remains in force and to be performed, desert or absent himself from such vessel, without leave of the master or skipper thereof, or of the owner or his agent, such deserter shall be liable to the same penalties as deserting seamen or mariners are subject to in the merchants' service, and may in the like manner, and upon the like complaint and proof, be apprehended and detained; and all costs of process and commitment if paid by the master or owner, shall be deducted out of the share of fish, or proceeds of any fishing voyage to which such deserter had or shall become entitled. And any fisherman, having engaged himself as aforesaid, who shall during such fishing voyage, refuse or neglect his proper duty on board the fishing vessel, being thereto ordered or required by the master or skipper thereof, or shall otherwise resist his just commands, to the hindrance or detriment of such voyage, beside being answerable for all damages arising thereby, shall forfeit to the use of the owner of such vessel, his share of the allowance, which shall be paid upon such voyage as is herein granted.

Sec. 5. *And be it further enacted*, That where an agreement or contract shall be so made and signed, for a fishing voyage or for the fishing season, and any fish which may have been caught on board such vessel during the same, shall be delivered to the owner or to his agent, for cure, and shall be sold by said owner or agent, such vessel shall for the term of six months after such sale, be liable and answerable for the skipper's and every other fish-

erman's share of such fish, and may be proceeded against in the same form, and to the same effect as any other vessel is by law liable, and may be proceeded against for the wages of seamen or mariners in the merchants' service. And upon such process for the value of a share or shares of the proceeds of fish delivered and sold as aforesaid, it shall be incumbent on the owner or his agent, to produce a just account of the sales and division of such fish according to such agreement or contract, otherwise the said vessel shall be answerable upon such process for what may be the highest value of the share or shares demanded. But in all cases, the owner of such vessel or his agent, appearing to answer to such process, may offer thereupon his account of general supplies made for such fishing voyage, and of other supplies therefor made, to either of the demandants, and shall be allowed to produce evidence thereof in answer to their demands respectively, and judgment shall be rendered upon such process, for the respective balances, which upon such an enquiry shall appear: *Provided always*, That when process shall be issued against any vessel liable as aforesaid, if the owner thereof or his agent will give bond to each fisherman in whose favour such process shall be instituted, with sufficient security, to the satisfaction of two justices of the peace, one of whom shall be named by such owner or agent, and the other by the fisherman or fishermen pursuing such process; or if either party shall refuse, then the justice first appointed shall name his associate, with condition to answer and pay whatever sum shall be recovered by him or them on such process, there shall be an immediate discharge of such vessel: *Provided*, That nothing herein contained shall prevent any fisherman from having his action at common law, for his share or shares of fish, or the proceeds thereof as aforesaid.

Sec. 6. *And be it further enacted*, That the drawback heretofore allowed on the exportation of foreign dried and pickled fish, and other foreign salted provisions, be, and the same is hereby repealed.

Sec. 7. *And be it further enacted*, That the monies which shall remain in consequence of the abolition of the allowance on the exportation of the dried fish of the United States, and of the drawback on foreign dried and pickled fish, and other foreign salted provisions, be, and the same are hereby appropriated to the payment of the allowances granted by this act, and in case the monies so appropriated

shall be inadequate, the deficiency shall be supplied out of any monies which from time to time shall be in the treasury of the United States, and not otherwise appropriated.

Sec. 8. *And be it further enacted*, That any person who shall declare falsely in any oath or affirmation required by this act, being duly convicted thereof in any court of the United States, having jurisdiction of such offence, shall suffer the same penalties as are provided for false swearing or affirming, by the act before mentioned, and to be in like manner sued for, recovered and appropriated.

Sec. 9. *And be it further enacted*, That this act shall continue and be in force for the term of seven years, and from thence to the end of the next session of Congress, and no longer.

[*This act passed February sixteenth*, 1792.]

No. XIII.

An Act concerning Consuls and Vice-Consuls.

FOR carrying into full effect the convention between the King of the French, and the United States of America, entered into for the purpose of defining and establishing the functions and privileges of their respective Consuls and Vice-Consuls:

Sec. 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled.* That where, in the seventh article of the said convention, it is agreed, that when there shall be no consul or vice-consul of the King of the French to attend to the saving of the wreck of any French vessels stranded on the coasts of the United States, or that the residence of the said consul, or vice-consul (he not being at the place of the wreck) shall be more distant from the said place than that of the competent judge of the country, the latter shall immediately proceed to perform the office therein prescribed; the district judge of the United States of the district in which the wreck shall happen, shall proceed therein, according to the tenor of the said article. And in such cases it shall be the duty of the officers of the customs, within whose districts such wrecks shall happen, to give notice thereof, as soon as may be, to the said judge, and to aid and assist

him to perform the duties hereby assigned to him. The district judges of the United States shall also, within their respective districts, be the competent judges, for the purposes expressed in the ninth article of the said convention, and it shall be incumbent on them to give aid to the consuls and vice-consuls of the King of the French, in arresting and securing deserters from vessels of the French nation, according to the tenor of the said article.

And where, by any article of the said convention, the consuls and vice-consuls of the King of the French, are entitled to the aid of the competent executive officers of the country, in the execution of any precept, the marshalls of the United States, and their deputies, shall, within their respective districts, be the competent officers, and shall give their aid according to the tenor of the stipulations.

And whenever commitments to the jails of the country shall become necessary, in pursuance of any stipulation of the said convention, they shall be to such jails within the respective districts, as other commitments under the authority of the United States are by law made.

And for the direction of the consuls and vice-consuls of the United States in certain cases.

Sec. 2. *Be it enacted by the authority aforesaid*, That they shall have right in the ports or places, to which they are or may be severally appointed, of receiving the protests or declarations, which such captains, masters, crews, passengers and merchants, as are citizens of the United States, may respectively chuse to make there; and also such as any foreigner may chuse to make before them, relative to the personal interest of any citizens of the United States; and the copies of the said acts, duly authenticated by the said consuls or vice-consuls, under the seal of their consulates respectively, shall receive faith in law, equally as their originals would in all courts in the United States It shall be their duty, where the laws of the country permit, to take possession of the personal estate, left by any citizen of the United States, other than seamen belonging to any ship or vessel, who shall die within their consulate, leaving there no legal representative, partner in trade or trustee by him appointed to take care of his effects, they shall inventory the same, with the assistance of two merchants of the United States, or for want of them, of any others at their choice; shall collect the debts due to the deceased, in the country where he died, and pay the debts

due from his estate which he shall have there contracted; shall sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and at the expiration of one year from his decease, the residue and the balance of the estate they shall transmit to the treasury of the United States, to be holden in trust for the legal claimants. But if at any time before such transmission, the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings.

For the information of the representative of the deceased, it shall be the duty of the consul or vice-consul, authorized to proceed as aforesaid in the settlement of his estate, immediately to notify his death in one of the gazettes published in the consulate, and also to the Secretary of State, that the same may be notified in the State to which the deceased shall belong; and he shall also, as soon as may be, transmit to the Secretary of State, an inventory of the effects of the deceased, taken as before directed.

Sec. 3. *And be it further enacted*, That the said consuls and vice-consuls, in cases where ships or vessels of the United States shall be stranded on the coasts of their consulates respectively, shall, as far as the laws of the country will permit, take proper measures, as well for the purpose of saving the said ships or vessels, their cargoes and appurtenances, as for storing and securing the effects and merchandize saved, and for taking an inventory or inventories thereof; and the merchandize and effects saved, with the inventory or inventories thereof taken as aforesaid, shall, after deducting therefrom the expense, be delivered to the owner or owners. *Provided*, That no consul or vice-consul shall have authority to take possession of any such goods, wares, merchandize or other property, when the master, owner or consignee thereof is present or capable of taking possession of the same.

Sec. 4. *And be it further enacted*, That it shall and may be lawful for every consul and vice-consul of the United States, to take and receive the following fees of office for the services which he shall have performed.

For authenticating under the consular seal, every protest, declaration, deposition, or other act, which such captains, masters, mariners, seamen, passengers, merchants or

others, as are citizens of the United States may respectively chuse to make, the sum of two dollars.

For the taking into possession, inventorying, selling and finally settling and paying, or transmitting as aforesaid, the balance due on the personal estate left by any citizen of the United States, who shall die within the limits of his consulate, five per centum on the gross amount of such estate.

For taking into possession, and otherwise proceeding on any such estate, which shall be delivered over to the legal representative before a final settlement of the same, as is herein before directed, two and an half per centum on such part delivered over as shall not be in money, and five per centum on the gross amount of the residue.

And it shall be the duty of the consuls and vice-consuls of the United States, to give receipts for all fees which they shall receive by virtue of this act, expressing the particular services for which they are paid.

Sec. 5. *And be it further enacted*, That in case it be found necessary for the interest of the United States, that a consul or consuls be appointed to reside on the coast of Barbary, the President be authorized to allow an annual salary, not exceeding two thousand dollars to each person so to be appointed: *Provided*, That such salary be not allowed to more than one consul for any one of the states on the said coast.

Sec. 6. *And be it further enacted*, That every consul and vice-consul shall, before they enter on the execution of their trusts, or if already in the execution of the same, within one year from the passing of this act, or if resident in Asia, within two years, give bond with such sureties as shall be approved by the Secretary of State, in a sum of not less than two thousand nor more than ten thousand dollars, conditioned for the true and faithful discharge of the duties of his office, according to law, and also for truly accounting for all monies, goods, and effects which may come into his possession by virtue of this act: and the said bond shall be lodged in the office of the Secretary of the Treasury.

Sec. 7. *And be it further enacted*, That to prevent the mariners and seamen, employed in vessels belonging to citizens of the United States, in cases of shipwreck, sickness or captivity, from suffering in foreign ports, it shall be the duty of the consuls and vice-consuls respectively, from time to

time, to provide for them in the most reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give, and not exceeding an allowance of twelve cents to a man per diem; and all masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, are hereby required and enjoined to take such mariners or seamen on board of their ships or vessels, at the request of the said consuls or vice-consuls respectively, and to transport them to the port, in the United States to which such ships or vessels may be bound, free of costs or charge; but that the said mariners or seamen shall, if able, be bound to do duty on board such ships or vessels, according to their several abilities: *Provided*, That no master or captain of any ship or vessel, shall be obliged to take a greater number than two men to every one hundred tons burthen of the said ship or vessel, on any one voyage: and if any such captain or master, shall refuse the same, on the request or order of the consul or vice-consul, such captain or master shall forfeit and pay the sum of thirty dollars for each mariner or seaman so refused, to be recovered for the benefit of the United States, by the said consul or vice-consul, in his own name, in any court of competent jurisdiction.

Sec. 8. *And be it further enacted*, That where a ship or vessel belonging to citizens of the United States, is sold in a foreign port or place, the master, unless the crew are liable by their contract, or do consent to be discharged there, shall send them back to the state where they entered on board, or furnish them with means sufficient for their return, to be ascertained by the consul or vice-consul of the United States, having jurisdiction of the port or place. And in case of the master's refusal, the said consul or vice-consul may (if the laws of the land permit it) cause his ship, goods and person to be arrested and held until he shall comply with his duty herein.

Sec. 9. *And be it further enacted*, That the specification of certain powers and duties, in this act, to be exercised or performed by the consuls and vice-consuls of the United States, shall not be construed to the exclusion of others, resulting from the nature of their appointments, or any treaty or convention under which they may act.

[*This act passed April fourteenth*, 1792.]

An Act for the Relief and Protection of American Seamen.

Sec. 1. BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the President of the United States, by and with the advice and consent of the Senate, be, and hereby is authorized to appoint two or more agents; the one of whom shall reside in the kingdom of Great-Britain, and the others at such foreign ports, as the President of the United States shall direct. That the duty of the said agents shall be, under the direction of the President of the United States, to enquire into the situation of such American citizens or others, sailing, conformably to the law of nations, under the protection of the American flag, as have been, or may hereafter be impressed or detained by any foreign power; to endeavour, by all legal means, to obtain the release of such American citizens or others, as aforesaid; and to render an account of all impressments and detentions whatever, from American vessels, to the executive of the United States.

Sec. 2. *And be it further enacted*, That if it should be expedient to employ an additional agent or agents, for the purposes authorized by this law, during the recess of the Senate, the President alone be, and hereby is, authorized to appoint such agent or agents.

Sec. 3. *And be it further enacted*, That the President of the United States be, and he is hereby authorized to draw, annually, out of the Treasury of the United States, a sum not exceeding fifteen thousand dollars, not otherwise appropriated, to be applied by him, in such proportions as he shall direct, to the payment of the compensation of the said agents, for their services, and the incidental expenses attending the performance of the duties imposed on them by this act.

Sec. 4. *And be it further enacted*, That the collector of every district shall keep a book or books, in which, at the request of any seaman, being a citizen of the United States of America, and producing proof of his citizenship, authenticated in the manner herein after directed, he shall enter the name of such seaman, and shall deliver to him a certificate, in the following form, that is to say: "I, A. B. collector of the district of D. do hereby certify, That E. F. an American seaman, aged years, or thereabouts,

of the height of feet inches, [describing the said seaman as particularly as may be] has, this day, produced to me proof in the manner directed in the act, entitled, "An act for the relief and protection of American seamen;" and, pursuant to the said act, I do hereby certify, that the said E. F. is a citizen of the United States of America: In witness whereof, I have hereunto set my hand and seal of office, this day of ." And it shall be the duty of the collectors aforesaid, to file and preserve the proofs of citizenship produced, as aforesaid: And for each certificate delivered, as aforesaid, the said collectors shall be entitled to receive, from the seaman applying for the same, the sum of twenty-five cents.

Sec. 5. And, in order that full and speedy information may be obtained of the seizure or detention, by any foreign power, of any seamen employed on board any ship or vessel of the United States, *Be it further enacted*, That it shall, and hereby is declared to be the duty of the master of every ship or vessel of the United States, any of the crew whereof shall have been impressed or detained by any foreign power, at the first port at which such ship or vessel shall arrive, if such impressment or detention happened on the high seas, or if the same happened within any foreign port, then in the port in which the same happened, immediately to make a protest, stating the manner of such impressment or detention, by whom made, together with the name and place of residence of the person impressed or detained; distinguishing also, whether he was an American citizen; and if not, to what nation he belonged. And it shall be the duty of such master, to transmit by post, or otherwise, every such protest made in a foreign country, to the nearest consul or agent, or to the minister of the United States resident in such country, if any such there be; preserving a duplicate of such protest, to be by him sent immediately after his arrival within the United States, to the Secretary of State, together with information to whom the original protest was transmitted: And in case such protest shall be made within the United States, or in any foreign country, in which no Consul, Agent or Minister of the United States resides, the same shall, as soon thereafter as practicable, be transmitted by such master, by post or otherwise, to the Secretary of State.

Sec. 6. *And be it further enacted*, That a copy of this law be transmitted by the Secretary of State, to each of the

ministers and consuls of the United States, resident in foreign countries, and by the Secretary of the Treasury, to the several collectors of the districts of the United States, whose duty it is hereby declared to be, from time to time, to make known the provisions of this law, to all masters of ships and vessels of the United States entering, or clearing at their several offices. And the master of every such ship or vessel shall, before he is admitted to an entry, by any such collector, be required to declare on oath, whether any of the crew of the ship or vessel under his command have been impressed or detained, in the course of his voyage, and how far he has complied with the directions of this act: And every such master, as shall wilfully neglect or refuse to make the declarations herein required, or to perform the duties enjoined by this act, shall forfeit, and pay the sum of one hundred dollars. And it is hereby declared to be the duty of every such collector, to prosecute for any forfeiture that may be incurred under this act.

Sec. 7. *And be it further enacted*, That the collector of every port of entry in the United States shall send a list of the seamen registered under this act, once every three months, to the Secretary of State, together with an account of such impressments or detentions, as shall appear, by the protests of the masters, to have taken place.

Sec. 8. *And be it further enacted*, That the first, second and third sections of this act shall be in force for one year, and from thence to the end of the next session of Congress thereafter, and no longer.

[*This act passed May twenty-eight*, 1796.]

An Act for the relief of sick and disabled Seamen.

Sec. 1. BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That from and after the first day of September next, the master or owner of every ship or vessel of the United States, arriving from a foreign port, into any port of the United States, shall, before such ship or vessel shall be admitted to an entry, render to the collector a true account of the number of seamen, that shall have been employed on board such vessel, since she was last entered at any port in the United States, and shall pay to the said collector, at

the rate of twenty cents per month for every seaman so employed; which sum he is hereby authorized to retain out of the wages of such seamen.

Sec. 2. *And be it further enacted*, That from and after the first day of September next, no collector shall grant to any ship or vessel, whose enrolment or licence for carrying on the coasting trade has expired, a new enrolment or licence, before the master of such ship or vessel shall first render a true account to the collector, of the number of seamen, and the time they have severally been employed on board such ship or vessel, during the continuance of the licence which has so expired, and pay to such collector twenty cents per month for every month such seamen have been severally employed, as aforesaid; which sum the said master is hereby authorized to retain out of the wages of such seamen. And if any such master shall render a false account of the number of men, and the length of time they have severally been employed, as is herein required, he shall forfeit and pay one hundred dollars.

Sec. 3. *And be it further enacted*, That it shall be the duty of the several collectors, to make a quarterly return of the sums collected by them, respectively, by virtue of this act, to the Secretary of the Treasury; and the President of the United States is hereby authorized, out of the same, to provide for the temporary relief and maintenance of sick and disabled seamen, in the hospitals or other proper institutions now established in the several ports of the United States, or, in ports where no such institutions exist, then in such other manner as he shall direct: *Provided*, That the monies collected in any one district, shall be expended within the same.

Sec. 4. *And be it further enacted*, That if any surplus shall remain of the monies to be collected by virtue of this act, after defraying the expense of such temporary relief and support, that the same, together with such private donations as may be made for that purpose (which the President is hereby authorized to recieve) shall be invested in the stock of the United States, under the direction of the President; and when, in his opinion, a sufficient fund shall be accumulated, he is hereby authorized to purchase or receive cessions or donations of ground or buildings, in the name of the United States, and to cause buildings, when necessary, to be erected as hospitals for the accommodation of sick and disabled seamen.

Sec. 5. *And be it further enacted*, That the President of the United States be, and he is hereby authorized to nominate and appoint, in such ports of the United States, as he may think proper, one or more persons, to be called directors of the marine hospital of the United States, whose duty it shall be to direct the expenditure of the fund assigned for their respective ports, according to the third section of this act; to provide for the accommodation of sick and disabled seamen, under such general instructions as shall be given by the President of the United States, for that purpose, and also subject to the like general instructions, to direct and govern such hospitals, as the President may direct to be built in the respective ports: and that the said directors shall hold their offices during the pleasure of the President, who is authorized to fill up all vacancies that may be occasioned by the death or removal of any of the persons so to be appointed. And the said directors shall render an account of the monies received and expended by them, once in every quarter of a year, to the Secretary of the Treasury, or such other person as the President shall direct; but no other allowance or compensation shall be made to the said directors, except the payment of such expenses as they may incur in the actual discharge of the duties required by this act.

[*This act passed July sixteenth*, 1798.]

An Act in addition to "An act for the relief of sick and disabled seamen."

Sec. 1. BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the President of the United States shall be, and he hereby is authorized to direct the expenditure of any monies which have been or shall be collected by virtue of an act, entitled, "An act for the relief of sick and disabled seamen," to be made within the state wherein the same shall have been collected, or within the state next adjoining thereto, excepting what may be collected in the states of New-Hampshire, Massachusetts, Rhode-Island, and Connecticut; any thing in the said act contained to the contrary thereof notwithstanding.

Sec. 2. *And be it further enacted*, That the Secretary of the navy shall be, and he hereby is authorized and direct-

ed to deduct, after the first day of September next, from the pay thereafter to become due, of the officers, seamen and marines of the navy of the United States, at the rate of twenty cents per month, for every such officer, seaman and marine, and to pay the same quarter-annually to the Secretary of the Treasury, to be applied to the same purposes, as the money collected by virtue of the above-mentioned act is appropriated.

Sec. 3. *And be it further enacted*, That the officers, seamen and marines of the navy of the United States, shall be entitled to receive the same benefits and advantages, as by the act above-mentioned, are provided for the relief of the sick and disabled seamen of the merchant vessels of the United States.

[*This act passed March two*, 1799.]

An Act to receive and continue in force, certain parts of the "Act for the relief and protection of American seamen," and to amend the same.

Sec. 1. BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the first, second and third sections of the act, entitled, "An act for the relief and protection of American seamen," shall be and hereby are revived and continued in force for one year.

Sec. 2. *And be it further enacted*, That the Secretary of State shall be, and hereby is required to lay before Congress, within ten days after the commencement of each ordinary session, an annual statement, containing an abstract of all the returns made to him, by the collectors of the different ports, pursuant to the said act, and of the communications received by him, from the agents employed by virtue of the same, in foreign countries.

[*This act passed March two*, 1799.]

An Act to amend an act, entitled "An Act for the relief of sick and disabled seamen" and for other purposes.

BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the

monies heretofore collected in pursuance of the several acts "for the relief of sick and disabled seamen," and at present unexpended, together with the monies hereafter to be collected by authority of the before mentioned acts, shall constitute a general fund, which the President of the United States shall use and employ as circumstances shall require for the benefit and convenience of sick and disabled American seamen: *Provided*, that the sum of fifteen thousand dollars be, and the same is hereby appropriated for the erection of an hospital in the district of Massachusetts.

Sec. 2. *And be it further enacted*, That it shall be lawful for the President of the United States to cause such measures to be taken as, in his opinion, may be expedient for providing convenient accommodations, medical assistance, necessary attendance, and supplies for the relief of sick or disabled seamen of the United States, who may be at or near, the port of New Orleans, in case the same can be done with the assent of the government, having jurisdiction over the port; and for this purpose, to establish such regulations, and to authorize the employment of such persons as he may judge proper; and that for defraying the expense thereof, a sum not exceeding three thousand dollars be paid out of any monies arising from the said fund not otherwise appropriated.

Sec. 3. *And be it further enacted*, That from and after the thirtieth day of June next, the master of every boat, raft or flat, belonging to any citizen of the United States, which shall go down the Mississippi with intention to proceed to New Orleans, shall, on his arrival at fort Adams, render to the collector or naval officer thereof, a true account of the number of persons employed on board such boat, raft or flat, and the time that each person has been so employed, and shall pay to the said collector or naval officer at the rate of twenty cents per month, for every person so employed, which sum, he is hereby authorized to retain out of the wages of such person: and the said collector or naval officer shall not give a clearance for such boat, raft or flat, to proceed on her voyage to New Orleans, until an account be rendered to him of the number of persons employed on board such boat, raft or flat, and the money paid to him by the master or owner thereof: and if any such master shall render a false account of the number of persons, and the length of time they have severally been employed, as is herein required, he shall forfeit and pay

fifty dollars, which shall be applied to, and shall make a part of, the said general fund for the purposes of this act: *Provided*, that all persons employed in navigating any such boat, raft or flat, shall be considered as seamen of the United States, and entitled to the relief extended by law to sick and disabled seamen.

Sec. 4. *And be it further enacted*, That the President of the United States be, and he is, hereby authorized to nominate and appoint for the port of New Orleans, a fit person to be director of the marine hospital of the United States, whose duties shall be in all instances the same as the directors of the marine hospital of the United States, as directed and required by the act, entitled "an act for the relief of sick and disabled seamen."

Sec. 5. *And be it further enacted*, That each and every director of the marine hospitals within the United States, shall, if it can with convenience be done, admit into the hospital of which he is director, sick foreign seamen, on the application of the master or commander of any foreign vessel to which such sick seamen may belong; and each seaman so admitted, shall be subject to a charge of seventy-five cents per day for each day he may remain in the hospital, the payment of which the master or commander of such foreign vessel shall make to the collector of the district in which such hospital is situated: and the collector shall not grant a clearance to any foreign vessel, until the money due from such master or commander, in manner and form aforesaid, shall be paid; and the director of each hospital is hereby directed under the penalty of fifty dollars, to make out the accounts against each foreign seaman that may be placed in the hospital, under his direction, and render the same to the collector.

Sec. 6. *And be it further enacted*, That the collectors shall pay the money collected, by virtue of this and the act to which this is an amendment, into the treasury of the United States, and be accountable therefor, and receive the same commission thereon, as for other money by them collected.

Sec. 7. *And be it further enacted*, That each and every director of the marine hospitals shall be accountable at the treasury of the United States for the money by them received in the same manner as other receivers of public money, and for the sums by them expended shall be allowed a commission at the rate of one per cent.

[*This act passed May three*, 1802.]

An Act supplementary to the "Act concerning Consuls and Vice-Consuls, and for the further protection of American Seamen."

BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That before a clearance be granted to any vessel bound on a foreign voyage, the master thereof shall deliver to the collector of the customs, a list, containing the names, places of birth and residence, and a description of the persons who compose his ship's company, to which list the oath or affirmation of the captain shall be annexed, that the said list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them, and the said collector shall deliver him a certified copy thereof, for which the collector shall be entitled to receive the sum of twenty-five cents; and the said master shall moreover enter into bond with sufficient security, in the sum of four hundred dollars, that he shall exhibit the aforesaid certified copy of the list to the first boarding officer, at the first port in the United States, at which he shall arrive on his return thereto, and then and there also produce the persons named therein, to the said boarding officer, whose duty it shall be to examine the men with such list, and to report the same to the collector, and it shall be the duty of the collector at the said port of arrival, (where the same is different from the port from which the vessel originally sailed) to transmit a copy of the list so reported to him, to the collector of the port from which said vessel originally sailed: *Provided*, That the said bond shall not be forfeited on account of the said master not producing to the first boarding officer, as aforesaid, any of the persons contained in the said list, who may be discharged in a foreign country with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent there residing, signified in writing, under his hand and official seal, to be produced to the collector with the other persons composing the crew as aforesaid; nor on account of any such person dying or absconding, or being forcibly impressed into other service, of which satisfactory proof shall be then also exhibited to the collector.

SEC. 2. *And be it enacted*, That it shall be the duty of every master or commander of a ship or vessel, belonging to citizens of the United States who shall sail from any

port of the United States, after the first day of May next, on his arrival at a foreign port, to deposit his register, sea-letter, and Mediterranean passport with the consul, vice-consul, commercial agent, or vice-commercial agent, (if any there be at such port;) that in case of refusal or neglect of the said master or commander, to deposit the said papers as aforesaid, he shall forfeit and pay five hundred dollars, to be recovered by the said consul, vice consul, commercial agent, or vice-commercial agent, in his own name for the benefit of the United States, in any court of competent jurisdiction; and it shall be the duty of such consul, vice-consul, commercial agent, or vice-commercial agent, on such master or commander producing to him a clearance from the proper officer of the port, where his ship or vessel may be, to deliver to the said master or commander all of his said papers. *Provided*, such master or commander shall have complied with the provisions contained in this act, and those of the act to which this is a supplement.

Sec. 3. *And be it further enacted*, That whenever a ship or vessel belonging to a citizen of the United States, shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander to produce to the consul, vice-consul, commercial agent, or vice-commercial agent, the list of his ship's company, certified as aforesaid, and to pay to such consul, vice-consul, commercial agent, or vice-commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months pay, over and above the wages which may then be due to such mariner or seaman, two thirds thereof to be paid by such consul, or commercial agent, to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute, and may be in such foreign port, and the several sums retained for such fund shall be accounted for with the treasury every six months by the persons receiving the same.

Sec. 4. *And be it further enacted*, That it shall be the du-

ty of the consuls, vice-consuls, commercial agents, vice-commercial agents of the United States, from time to time to provide for the mariners and seamen of the United States, who may be found destitute within their districts respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give; and that all masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, are hereby required and enjoined to take such mariners or seamen on board of their ships or vessels, at the request of the said consuls, vice-consuls, commercial agents or vice-commercial agents respectively, and to transport them to the port in the United States to which such ships or vessels may be bound, on such terms not exceeding ten dollars for each person, as may be agreed between the said master and consul, or commercial agent. And the said mariners or seamen shall, if able, be bound to do duty on board such ships or vessels according to their several abilities; *Provided*, That no master or captain of any ship or vessel shall be obliged to take a greater number than two men to every one hundred tons burthen of the said ship or vessel, on any one voyage; and if any such captain or master shall refuse the same on the request or order of the consul, vice-consul, commercial agent or vice-commercial agent, such captain or master shall forfeit and pay the sum of one hundred dollars for each mariner or seaman so refused, to be recovered for the benefit of the United States in any court of competent jurisdiction. And the certificate of any such consul or commercial agent given under his hand and official seal, shall be *prima facie* evidence of such refusal in any court of law having jurisdiction for the recovery of the penalty aforesaid.

Sec. 5. *And be it further enacted*, That the seventh and eighth section of the act, entitled, "An act concerning consuls and vice-consuls," be and the same are hereby repealed; and that the Secretary of State be authorized to reimburse the consuls, vice-consuls, commercial agents, or vice-commercial agents, such reasonable sums as they may heretofore have advanced for the relief of seamen, though the same should exceed the rate of twelve cents a man per diem.

Sec. 6. *And be it further enacted*, That it shall and may

be lawful for every consul, vice-consul, commercial agent and vice-commercial agent of the United States, to take and receive for every certificate of discharge of any seaman or mariner in a foreign port fifty cents; and for commission on paying and receiving the amount of wages payable on the discharge of seamen in foreign ports, two and a half per centum.

Sec. 7. *And be it further enacted*, That if any consul, vice-consul, commercial agent or vice-commercial agent, shall falsely and knowingly certify, that property belonging to foreigners is property belonging to citizens of the United States, he shall on conviction thereof, in any court of competent jurisdiction, forfeit and pay a fine not exceeding ten thousand dollars, at the discretion of the court, and be imprisoned for any term not exceeding three years.

Sec. 8. *And be it further enacted*, That if any consul, vice-consul, commercial agent or vice-commercial agent, shall grant a passport or other paper certifying that any alien, knowing him or her to be such, is a citizen of the United States, he shall on conviction thereof, in any court of competent jurisdiction, forfeit and pay a fine not exceeding one thousand dollars.

[*This act passed February twenty-eight*, 1803.]

Part of an Act concerning Consuls and Vice-Consuls, and for the further protection of American seamen.

BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That all powers of attorney for the transfer of any stock of the United States, or for the receipt of interest thereon, executed in a foreign country, since the thirtieth day of June, one thousand eight hundred and three, according to the forms in use, at the treasury of the United States, prior to the said thirtieth day of June, one thousand eight hundred and three, shall be valid to all intents and purposes; any provision in the aforesaid section, hereby repealed, to the contrary notwithstanding.

[*This act passed March twenty-seventh*, 1804.]

No. XIV.

An Act providing for salvage in cases of recapture.

Sec. 1. BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That when a vessel, other than a vessel of war or privateer, or when any goods which shall hereafter be taken as prize by any vessel, acting under authority from the government of the United States, shall appear to have before belonged to any person or persons, resident within, or under the protection of, the United States, and to have been taken by an enemy of the United States, or under authority, or pretence of authority, from any prince, government or state, against which the United States have authorized, or shall authorize defence or reprisals, such vessel or goods not having been condemned as prize by competent authority, before the recapture thereof, the same shall be restored to the former owner or owners thereof, he or they paying for and in lieu of salvage, if retaken by a publie vessel of the United States, one eighth part, and if retaken by a private vessel of the United States, one sixth part, of the true value of the vessel or goods so to be restored, allowing and excepting all imposts and public duties to which the same may be liable. And if the vessel so retaken shall appear to have been set forth and armed as a vessel of war, before such capture or afterwards, and before the retaking thereof as aforesaid, the former owner or owners, on the restoration thereof, shall be adjudged to pay for and in lieu of salvage, one moiety of the true value of such vessel of war, or privateer.

Sec. 2. *And be it further enacted*, That when any vessel or goods which shall hereafter be taken as prize, by any vessel acting under authority from the government of the United States, shall appear to have before belonged to the United States, and to have been taken by an enemy of the United States, or under authority, or pretence of authority from any prince, government or state, against which the United States have authorized, or shall authorize defence or reprisals, such public vessel not having been condemned as prize, by competent authority, before the recapture thereof, the same shall be restored to the United States. And for and in lieu of salvage, there shall be paid from the Treasury of the United States, pursuant to the final decree

which shall be made in such case by any court of the United States, having competent jurisdiction thereof, to the parties who shall be thereby entitled to receive the same, for the recapture as aforesaid, of an unarmed vessel, or any goods therein, one sixth part of the true value thereof, when made by a private vessel of the United States, and one twelfth part of such value when the recapture shall be made by a public armed vessel of the United States; and for the recapture as aforesaid of a public armed vessel, or any goods therein, one moiety of the true value thereof, when made by a private vessel of the United States, and one fourth part of such value, when such recapture shall be made by a public armed vessel of the United States.

Sec. 3. *And be it further enacted*, That when any vessel or goods, which shall be taken as prize, as aforesaid, shall appear to have before belonged to any person or persons, permanently resident within the territory, and under the protection of any foreign prince, government or state, in amity with the United States, and to have been taken by an enemy of the United States, or by authority, or pretence of authority from any prince, government or state, against which the United States have authorized, or shall authorize, defence or reprisals, then such vessel or goods shall be adjudged to be restored to the former owner, or owners thereof, he or they paying for and in lieu of salvage, such proportion of the true value of the vessel or goods so to be restored, as by the law or usage, of such prince, government or state, within whose territory such former owner or owners shall be so resident, shall be required on the restoration of any vessel or goods of a citizen of the United States, under like circumstances of recapture, made by the authority of such foreign prince, government or state; and where no such law or usage shall be known, the same salvage shall be allowed as is provided by the first section of this act: *Provided*, That no such vessel or goods shall be adjudged to be restored to such former owner or owners, in any case where the same shall have been, before the recapture thereof, condemned as prize by competent authority, nor in any case where by the law or usage of the prince, government or state, within whose territory such former owner or owners shall be resident as aforesaid, the vessel or goods of a citizen of the United States, under like circumstances of recapture, would not be restored to such citizen of the United States: *Provided also*, that

nothing herein shall be construed to contravene or alter the terms of restoration in cases of recapture, which are or shall be agreed on in any treaty between the United States and any foreign prince, government or state.

Sec. 4. *And be it further enacted*, That all sums of money which may be paid for salvage, as aforesaid, when accruing to any public armed vessel, shall be divided to and among the commanders, officers and crew thereof, in such proportions as are or may be provided by law, respecting the distribution of prize money: And when accruing to any private armed vessel, shall be distributed to and among the owners and company concerned in such recapture according to their agreements, if any such there be; and in case there be no such agreement, then to and among such persons, and in such proportions, as the court having jurisdiction thereof shall appoint.

Sec. 5. *And be it further enacted*, That such parts of any acts of Congress of the United States, as respect the salvage to be allowed in cases of recapture, shall be, and are hereby repealed, except as to cases of recapture made before the passing of this act.

[*This act passed March third*, 1800.]

An Act to prevent the issuing of Sea-Letters, except to certain vessels.

BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That from and after the thirtieth day of June next, no sea-letter or other document, certifying or proving any ship or vessel, to be the property of a citizen of the United States, shall be issued, except to ships or vessels duly registered, or enrolled, and licenced, as ships or vessels of the United States, or to vessels which at that time shall be wholly owned by the citizens of the United States, and furnished with, or entitled to sea-letters or other custom-house documents, any law or laws, heretofore passed to the contrary notwithstanding: *Provided nevertheless*, that no sea-letter shall be issued to any vessel, which shall not at this time be furnished or entitled to a sea-letter, unless such vessel shall return to some port or place in the United States, or territories thereof, on or before the said thirtieth day of

June next: *Provded nevertheless*, that no sea-letter or other document, certifying or proving any ship or vessel to be the property of a citizen or citizens of the United States, shall be issued to any vessel now abroad, which shall not at this time be furnished or entitled to a sea-letter, unless such vessel shall arrive at some port or place in the United States, or territories thereof, on or before the said thirtieth day of June next: *And provided*, that nothing herein contained, shall be construed to operate against any such vessel or vessels that now are, or may be, prior to the thirtieth day of June, detained abroad by the authority of any foreign power.

[*This act passed March twenty-sixth*, 1810.]

DIGEST OF AMERICAN DECISIONS.

PART I.

OWNERS OF MERCHANT SHIPS.

1. The sale of a ship at sea is not complete and perfect, as against third persons, who have no knowledge of the sale, until there has been an actual delivery of the ship to the purchaser.—*Lamb & al.* vs. *Durant*, xii. *Mass. Rep.* 54.

2. Thus, where a ship owned by partners was sold by one of the partners, while the ship was at sea, and another partner afterwards sold and delivered the ship to another person, who had no knowledge of the first sale; it was held that the second purchaser had the best title to the property, both sales being *bonâ fide*.—*Ibid.*

3. And, if a ship at sea be mortgaged, the mortgagee must take the possession as soon as may be on her return, before the mortgage is complete.—*The President &c. of the Portland Bank* vs. *Stubbs and al.* vi. 422. *Putnam* vs. *Dutch*, viii. 287. *Lamb. & al.* vs. *Durant*, xii. *Mass. Rep.* 54.

4. But a conveyance by deed, for a valuable consideration, of a vessel and cargo abroad at the time of the sale, is good and valid, even against creditors, if the vendee take possession of the property as soon as he has knowledge of its being within his reach.—*The President &c. of the Portland Bank* vs. *Stacey & al.* iv. 661. *Putnam* vs. *Dutch*, viii. 287. *Lamb & al.* vs. *Durant*, xii. *Mass. Rep.* 54.

5. The purchaser of a ship abroad must take it subject to all incumbrances on the ship, and to all lawful contracts, which the master had before made, or should afterwards make respecting the employment of the ship; and whatever contracts he might lawfully make as the master of the ship of the original owners, he may still lawfully make after the transfer, until he has notice of it; for this authority in the master must be considered as recognized by every purchaser of a ship abroad, or manifest mischief and injustice might be the consequence.—*The President &c. of the Portland Bank* vs. *Stubbs & al.* vi. 422. *Lamb & al.* vs. *Durant*, xii. *Mass. Rep.* 54.

6. Under the 91st section of the act of congress passed *March* 2d, 1799, for the collection of duties to entitle an officer of a revenue cutter to a share of the forfeiture, the information given by him must be of such a nature, as to conduce essentially, although not independently of other evidence, to a forfeiture. *Brewster v. Gelston*, 11 *Johns. Rep.* 390.

7. The mere naked seizure of a vessel by the officers of a revenue cutter, does not give any right to a share of the forfeiture. *ib.*

8. The settlement of the collector's accounts respecting the proceeds and distribution of forfeitures, and the expenses attending condemnation, at the treasury of the *United States*, is to be received as *prima facie* evidence of the fairness and correctness of such settlement. *ib.*

9. Where a contract was entered into for the sale of a vessel, the possession of which was taken immediately, but it was agreed that a bill of sale was not to be given until the whole of the purchase money was paid, and, in the mean time, the register stood in the name of the original owner, who, however, exercised no controul over the vessel in any respect; it was held, that he was not liable for repairs made by direction of the master, as agent for, and on the credit of the purchaser between the time of executing the contract, and the final consummation of it, by the delivery of a bill of sale, but that the person furnishing the repairs must look to the purchaser for payment. *Leonard and M'Carty v. Huntington and another*, 15 *Johns. Rep.* 298.

10. The ship's register is not evidence of the ownership of the person in whose name it stands. *ib.*

11. The owner as well as master, is liable for repairs done upon a vessel. *Marguard v. Webb*, 16 *Johns. Rep.* 89.

12. A regular bill of sale is not essential to transfer the property in a ship or vessel; but the same passes by delivery, like any other chattel. *Wendover and others v. Hogeboom and others*, 7 *Johns. Rep.* 308.

13. The law of the *United States* requiring the register to be inserted in the bill of sale, on every transfer of the vessel, does not effect the validity of the transfer, but only the character and privileges of the vessel, as an *American* ship. *ib.*

14. A *mortgage* of a ship, *out of possession* is not liable for repairs or necessaries furnished the ship. *M'Intire and Bradford v. Scott*, 8 *Johns. Rep.* 159.

15. Delivery of a vessel conveys the title, the sale differing in no wise from the sale of any other chattel. *Wendover et al. v. Hogeboom et al. Anthon's Nisi Prius*, 120.

16. A bill of sale is not essential to transfer the title to a vessel. *ib.*

17. In the case of registered vessels, a bill of sale reciting the registry is requisite, not for the purpose of transferring the title, but for the purpose of securing her American character. *id.* 122. *n. a.*

18. Difference between the laws of *Great Britain* and of the *United States* in this particular. *ib.*

19. The registry or enrollment of a ship can never be evidence for the owners. *Wendover et al. v. Hogeboom, Anthon's Nisi Prius*, 120. *n. a.*

20. Nor can it be evidence against them, unless accompanied by proof shewing it to have been their act. *ib.*

21. Whether the mortgagee of a ship, not in possession, is answerable for repairs done upon her while his title continues, seems a question not yet settled. *Tucker vs. Buffington et al.* 15 *Mass. Rep.* 477.

22. But where one took an unconditional bill of sale of a vessel, and took out a certificate of enrolment in his own name, he was held answerable for such repairs, although he had given the vendors a written acknowledgment, that the conveyance was made to him as collateral security for a debt due to him, with a promise to reconvey on payment of the debt; and had received none of her earnings nor acted in any manner as owner. *ib.*

23. Where one hired a vessel for six months, rendering to her owners a moiety of her earnings, and sailed in her himself as master, it was holden that he was so far the owner of the vessel, that he could not be charged with barratry. *Taggard et al. vs. Loring.* 16 *Mass. Rep.* 336.

24. The hiring in the above case may be by parole. *ib.*

25. If three joint owners of a cargo employ the master of the ship to sell it for them, and he afterwards become interested in the share of one of the joint owners, he cannot in an action brought against him, by the three joint

owners to recover the amount of the sales, set off his share of that amount. *Young vs. Black*, 7 *Cranch. Rep.* 565.

26. A sale of a vessel by the authority of the captors before sentence of condemnation, is affirmed by such sentence, and is good *ab initio*. *Williams vs. Armroyd.* 7 *Cranch. Rep.* 424.

27. Where the general owner of a ship retains the possession, command and navigation of the same, and contracts to carry a cargo on freight for the voyage, the charter-party is to be considered as mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership, but the general owner is to be considered as owner for the voyage, and if he be master he cannot commit barratry. *Marcadier vs. Ches. Ins. Com.* 8 *Cranch.* 49.

PART. II.

PERSONS EMPLOYED IN THE NAVIGATION OF MERCHANT SHIPS.

1. When the progress of a voyage is interrupted in a foreign port, either by a capture as prize, or by other detentions or casualties, the master of the vessel becomes of necessity an authorized agent for the owners, freighters, insurers, and all concerned; and whatever he undertakes, and whatever expenses he may incur, for the benefit of all concerned, become a charge upon them respectively, as much as when incurred under a special authority and license, or pursuant to an immediate request.—*Douglas* vs. *Moody & al.* ix. *Mass. Rep.* 548.

2. And, in case of the capture of a ship, the master is bound to stay by the ship, to see to her preservation, and to endeavour to obtain her discharge; and he has power to engage necessary aid for that purpose.—*Lemon* vs. *Walker & al.* ix. *Mass. Rep.* 404.

3. Where the master of a vessel, who had signed a bill of lading promising to deliver goods to the owner, unless prevented by unavoidable accidents, had received instructions from the owner of the goods to manage with them as certain other persons should direct, who gave the master an unlimited discretion to exercise his own judgment in the

disposition of the property; it was held that he was justified in departing from the strict letter of the bill of lading, if his conduct were discreet and prudent, and influenced by a regard for the interest of his employer; and that nothing short of gross negligence or fraud would render him liable in case of any misfortune.—*Forrester* vs. *Dodge*, xii. *M. R.* 565.

4. When necessary supplies are to be furnished for a vessel on her voyage, and from home, the merchant may furnish them on the credit of the vessel, by taking an hypothecation; or on the credit of the master with his consent; or on the credit of all who are owners at the time the supplies are furnished; because they have the use and benefit of them.—*Hussey* vs. *Allen & al.* vi. *Mass. Rep.* 163. *James* vs. *Bixby & al.* xi. *Mass. Rep.* 34.

5. All the part-owners of a vessel are liable for supplies furnished for the vessel, although all the part-owners be not known to him who furnished the supplies.—*Chapman* vs. *Durant & al.* x. *Mass. Rep.* 47.

6. But, if the person furnishing the supplies take a negotiable note therefor, from either of the part-owners, the original contract is discharged, and he can have no remedy against the other part-owners.—*Ibid.*

7. If the master of a vessel procure necessary repairs to be made, without any express contract, an implied obligation arises, as well against the owners as against himself, to pay for such repairs.—*James* vs. *Bixby & al.* xi. *M. R.* 34.

8. But, if there be a special promise by the master, the owner is not liable; and, *e converso*, where there is a special promise by the owner, the master is discharged from any obligation.—*Ibid.*

9. And, if a ship be repaired under the eye of the owner, there is an implied promise on his part to pay for the work; the law, in such case, presuming a request, if the owner suffer the work to proceed.—*Ibid.*

10. But, if the owner of the ship have employed some person to procure the work to be done, to whom the workmen engaged themselves, and on whose credit they performed the work, the owner will not be liable.—*Ibid.*

11. And, if a person to whom a ship is consigned procure repairs to be done upon the ship, without having any express authority for the purpose, and without pretending to act as the agent of another in the contract, and the me-

chanic should trust to him altogether, the owner will not be liable to the mechanic for the work.—*Ibid.*

12. Yet it is in the power of a merchant abroad to procure repairs to be done upon a ship consigned to him, without making himself liable for the expenses, by disclosing his principal, and expressly stating that he himself is not to be looked to for payment.—*Ibid.*

13. If a part only of the owners of a vessel charter the vessel, and execute a charter-party for themselves and the other owners, the hirers can have no remedy for the repairs, but upon the charter-party, against those who executed it.—*Kimball* vs. *Tucker & al.* x. *Mass. Rep.* 192.

14. In a contract of charter-party, where the owner contracts with the hirer that the vessel shall be staunch, strong, and suitably provided and apparelled with all things necessary for such a vessel and the voyage to be undertaken, it is necessarily understood that every defect of the vessel happening abroad, in the course of the voyage, is to be repaired by the hirer and employer, for which he is to be reimbursed by the owner.—*Ibid.*

15. A merchant at home, sending his ship abroad, is presumed to know the customs and usages of the port to which he sends her; and, when he sends his ship thither, he is liable for all customary charges and expenses.—*Winthrop* vs. *Carleton*, xii. *Mass. Rep.* 4.

16. And even if an action at law would not lie against his agent or consignee for any debt incurred by the ship, or in relation to the ship; yet, if an action would lie against the owner, or if the agent or consignee, being bound in honour to pay according to the usage of the place, shall pay the debt, in confidence that what is customary among merchants will be allowed by his principal, he shall be reimbursed; for the owner is presumed to authorize every thing to be done by the consignee, which the custom of the place, where the vessel is, shall require to be done.—*Ibid.*

17. Thus, where the consignee of a ship paid the charges of the last sickness and funeral of the master, according to the custom of the place where the ship was, the owner was held to reimburse the money so paid by the consignee.—*Ibid.*

18. Where an outward voyage and a homeward voy-

age are spoken of in a contract as distinct, the freight becomes due upon the performance of each voyage; and any other expressions, descriptive of a voyage or adventure, consisting of several distinct and separate voyages or passages, are within the same reason and governed by the same rule.—*Brown* vs. *Hunt & al.* xi. *Mass. Rep.* 45.

19. Where, after a cargo had been put on board a vessel, she was prevented from sailing by an embargo, and the master, with the consent of the owner of the cargo, proceeded to another port to wait the termination of the embargo, where the cargo was discharged and sold in consequence of the voyage becoming illegal; it was held that no freight was due for the transporting of the cargo from the port of lading to the place where it was discharged; although the cargo had become more valuable by the removal.—*Brown* vs. *Delano & al.* xii. *Mass. Rep.* 370.

20. The master of a vessel, in which goods are carried on freight, is, by the terms of the contract, entitled to demand and receive the freight money, or price at which the goods are to be carried and delivered; and he may retain the goods until the freight is paid; and when it is paid he has the same right in the money, that a factor or consignee has in the goods of the principal or consignor, for whom money has been advanced, or any liabilities have been incurred in consequence of the employment or consignment.—*Lewis* vs. *Hancock*, xi. *Mass. Rep.* 72.

21. Where a contract was entered into between a shipper of goods and the ship-owner, that the goods should be carried to a foreign market, on the account and risk of the shipper, and that the nett proceeds of the sale there, after deducting freight and commissions, should be paid to the shipper within a certain time after the arrival of the ship at her port of discharge on her return voyage; it was held that the shipper was liable for no losses incurred on the return voyage, but was entitled to receive the nett proceeds of his goods, after deducting the freight and commissions; notwithstanding a loss by stranding, if the ship might have gone to her intended port of discharge, after having been repaired; and notwithstanding the shipper had caused his interest to be insured for the homeward aswell as the outward voyage.—*Wallis & al.* vs. *Cook*, x. *M. R.* 510.

22. The owner of a ship is not liable for goods clandestinely taken on board by the master, where the owner is

present and has the management of the voyage himself, or where he has an agent with whom he entrusts that business, leaving nothing to the master but the care of sailing and directing the ship; and especially when the ship is not a freighting ship, and when the shipper might have known the limited authority of the master.—*Walker* vs. *Brewer*, xi. *Mass. Rep.* 99.

23. But, if a ship-owner, under such circumstances, assent to and adopt the act of the master, or if he have knowledge, before the sailing of the vessel, that the goods were received on board upon freight, he will be accountable for the goods, notwithstanding the contract were made with the master alone.—*Ibid.*

24. Demurrage is a voluntary detention in a party contracting for freight; but it is not a detention by capture.—*Douglass* vs. *Moody & al.* ix. *Mass. Rep.* 548.

25. The act of this state (sess. 22. c. 1.) *authorizing the arrest of ships or vessels, for debts contracted by the master, owner, or consignee, for or on account of such ships or vessels, &c.* and the act (sess. 40. c. 60.) amending the same, extend only to ships and vessels navigating the *ocean* or at most, such as sail coastwise, from port to port. A ferry boat plying across a river as from *New York* to the opposite shore of *New Jersey* is not liable to attachment under these statutes. *Birkbeck v. Hoboken Horse Ferry Boats*, 17 *Johns. Rep.* 54.

26. The master and owners of a ship are responsible for the goods which they have undertaken to carry, if stolen or embezzled by the crew or any other person, though no fault or negligence may be imputable to them. *Schieffelin and another v. Harvey*, 6 *Johns. Rep.* 170.

27. Where goods were shipped at *New York* to be delivered in *London*, and on the arrival of the ship, the goods were refused admission, being prohibited by the laws of *England*, and the consignee and master agreed that the goods should remain on board, and be returned to the shippers in *New York*, at their risk, they paying the freight from *London*, and an endorsement was made to that effect, on the bill of lading; it was held, that the ship owner was responsible for the embezzlement of any part of the goods between the time of the first shipment at *New York* and their return there, though *English* custom house officers were on board during the time the vessel lay at *London*,

and though they may have embezzled the goods, and not the master or crew, or any person with their knowledge. *ib.*

28. Every shipment remains on the account and risk of the shippers, unless there be an express or implied authority to change the proprietary interest, and put the shipment at the risk of the consignee. *The San Jose Indiano*, 1 *Mason Rep.* 38.

29. If the shipping articles omit to state the shares, to which some of the officers and crew are entitled, they are still entitled to claim their shares under the prize act. *The Dash*, 1 *Mason Rep.* 4.

30. Of the effect of capture upon the contract for mariners's wages. *Emerson* vs. *Howland*, 1 *Mason Rep.* 45.

31. A voyage in shipping articles from *A.* to *B.* or some other port for a cargo of salt, and return to the *United States*, is not ended on the arrival at the first port of the *United States*, unless it be the port of discharge. *United States* vs. *Smith*, 1 *Mason Rep.* 147.

32. If the master of a ship, after the commencement of the voyage, be by sickness disabled from pursuing it, and a new master is appointed, the shipping contract with the seamen is not dissolved thereby. *United States* vs. *Hamilton*, 1 *Mason Rep.* 443.

33. The ship registry acts of the *United States* have not changed the common law as to the mode, in which ships may be transferred; but only taken from any ship not transferred according to those acts, the character of an American ship. *Weston* vs. *Penniman*, 1 *Mason Rep.* 306.

34. By the general maritime law, a transfer of a ship should be evidenced by a bill of sale. *ib.*

35. The legal title in a registered ship, may consistently with the acts exist in one person, and the equitable title in another; and the disclosure of such equitable title is not required by the acts, unless one party be an alien. *ib.*

36. The 27th section of the revenue act of the 2d of March 1799, ch. 128, comprehends foreign as well as American vessels bound to the *United States*. *The Betsy*, 1 *Mason Rep.* 356.

37. Where the captors have been guilty of irregularity, in not bringing in the papers, or the master of the captur-

ed ship, farther proof will be ordered. *The London Packet*, 1 *Mason Rep.* 14.

38. The effect of false and simulated papers. *The George*, 1 *Mason Rep.* 24.

39. If a person has in the acts of the court asserted himself as part owner of a privateer, he will be responsible as such owner for damages assessed against such privateer, although his name be not in the ship's papers. *The Mary*, 1 *Mason Rep.* 365.

40. By the general maritime law, every contract of the master for repairs and supplies imports an hypothecation. *The Jerusalem*, 2 *Gallison Rep.* 349.

41. A tradesman has a lien on a foreign ship, lying in a port of the *United States*, for repairs made by him on board, and such lien will be preferred, in point of right, to a bottomry interest which is prior in point of time, if it appear that the repairs were indispensable. *S. C.* 1 *Mason Rep.* 345.

42. *Quære*, If there be a lien for repairs and supplies in the case of a domestic ship. *S. C.* 2 *Gallison Rep.* 349.

43. In what cases the charterer is owner for the voyage. *Kleine* vs. *Catara*, 2 *Gallison Rep.* 76.

44. A wharfinger has a lien on a foreign ship for wharfage by a law of the Admiralty. *Ex parte*, *Lewis*, 2 *Gallison Rep.* 483.

45. But if the wharfinger have made an express personal contract with the ship owner, the Court will not give the wharfinger a priority of claim over a bottomry interest, which previously attached on the ship. *ib.*

46. *Quære*, if such personal contract be a waiver of the lien? *ib.*

47. To render the owner of a vessel liable for the contracts of the master, it must be proved that the vessel was in the employment of the owner, and that the master was appointed by him, and that he acted in making such contracts, within the scope of his authority. *Reynolds* vs. *Toppan*, 15 *Mass. Rep.* 370.

48. A vessel of the *United States* went into the port of an enemy; pretending to belong to a neutral nation, and in that character the master obtained a credit of a merchant belonging there for her repairs, and also for the expense

of defending her in the Admiralty, she being libelled and finally condemned as enemy's property: it was holden that an action lay after the return of peace, for the merchant against the owners of the vessel, for the advances so made by him. *Musson et al.* vs. *Fales et al.* 16 *Mass. Rep.* 322.

PART III.

CARRIAGE OF GOODS IN MERCHANT SHIPS.

1. If a vessel chartered for a voyage be sufficient at the commencement of it, but be entirely lost in the course of it, the hirer must betake himself to another vessel, and the owner loses his freight-money, upon the contract of charter-party, but nothing more; yet the hirer must not abandon the vessel while he can keep her afloat, and suitably provided for the employment and destination for which she was hired; and the owner must be ready to pay all damages and expenses necessarily incurred for the purpose.—*Kimball* vs. *Tucker & al.* x. *Mass. Rep.* 192.

2. The charterers of a vessel are obliged to victual and man the vessel, unless there be an express stipulation to the contrary in the charter-party; and, if the owner be compelled to pay the seamen, in order to relieve his vessel from the lien they have upon it for their wages, he may recover the amount so paid of the hirers, and perhaps of the master.—*Goodridge & al.* vs. *Lord*, x. *Mass. Rep.* 483.

3. If there be a stipulation in a charter-party, that the hire of the vessel shall be paid to the owner upon the discharge and delivery of the return-cargo, and the owner be ready to deliver it, but the actual discharge and delivery of it be prevented by the neglect of the hirer to receive it; or if the delivery be prevented by an attachment or seizure for the default of the hirer, the owner will be as well entitled to the stipulated hire, as he would have been upon an actual discharge and delivery of the cargo.—*Bradstreet & al.* vs. *Baldwin*, xi. *Mass. Rep.* 229.

4. If, after the making of a contract of charter-party and before the sailing of the vessel, the voyage become illegal, the contract will be dissolved; and, if any bills of lading have been signed by the master, they cannot be enforced. —*Brown* vs. *Delano & al.* xii. *Mass. Rep.* 370.

5. Goods laden on deck and ejected, are not subjects of general average. *Smith and Stanley v. Wright*, 1 *Caines' Rep.* 43.

6. A *Spanish* ship bound from *Havannah de Cuba* to *London*, having met with a violent gale of wind, put into the port of *New York*, and was entered at the custom house as a ship *in distress;* having conformed to the regulations of the act of congress (cong. 5. sess. 3. c. 128. s. 60.) in such cases; she was condemned, after a regular survey, by the wardens of the port, as unfit to be repaired, and, under their direction, was sold at public auction, and purchased by *American* citizens, who, at their own expense, repaired her and fitted her out on a voyage to *Cadiz;* but the collector of the port refused to give her a clearance, unless the new owners would first pay the tonnage duty or *light money*, of 50 *cents per ton* imposed on all *foreign* ships entering the ports of the *United States*. The owners objected to this demand as illegal; but paid the money and afterwards brought an action of *assumpsit* against the collector to recover it back. Before the suit was commenced, the money had been paid by the collector into the *United States' Bank*, to the order of the treasurer of the *United States;* no *notice*, previous to the action having been given him not to pay the money over. It was *held*, that no tonnage duty or *light money* was due, in this case; and, at any rate, it was wrongfully demanded of the plaintiffs, who, having paid it *compulsively* were entitled to recover it back from the collector, without showing a *notice* to him not to pay it over; especially, as there was no other person against whom the plaintiffs could bring their action. *Ripley and others v. Gelston*, 9 *Johns. Rep.* 201.

7. A., the master of a vessel called the *Urania*, lying at *Amsterdam*, for 1750 guilders, paid in advance by B., contracted for his passage on board the *Urania*, from *Amsterdam* to *Batavia*. The vessel put into *New York* in distress, and the owner repaired her and sent her on a different voyage, but offered B. a passage in another vessel which was ready to sail from *New York* to *Batavia*, and was a larger and more commodious ship. B., though he did not accept the offer, did not object to the change of the ship, but said he had business to transact in *Philadelphia* and could not proceed immediately to *Batavia*. In an action brought by B. to recover back the money so paid to A.,

it was held, that he was not entitled to recover back any part of it, it being his own act that he did not pursue the voyage to *Batavia*, the vessel in which he set sail having deviated from her direct course through necessity, and the providing diet and accommodations for this passage, entering especially into the consideration of the advance of the passage money for the voyage, part of which had actually been performed. *Destouches v. Peck*, 9 *Johns. Rep.* 210.

8. Goods were laden on board of a vessel to be transported from *Richmond* to *New York*. The vessel proceeded on her voyage in the beginning of *February*, but finding the *Chesapeake* blockaded by a hostile squadron, and that it would be impossible to put to sea, without being captured, went into *Norfolk*, and, finally, returned to *Richmond*. In *September* following, the plaintiffs demanded their goods, in order to transport them to *New York* by land, but the master refused to deliver them unless on being paid half freight; and a few days thereafter, the vessel, with the goods on board was totally lost; without the default of the defendants or the master, the blockade having continued until that time: Held, that the defendants had no claim for freight, the voyage not having been performed; and that more than a reasonable time for sending on the goods having elapsed, they had no right to retain them and were liable to the plaintiffs for their value, notwithstanding they were lost by inevitable accident. *Lorillard v. Palmer and others*, 15 *Johns. Rep.* 14.

9. The ship owner is bound to deliver the goods to the consignee within a reasonable time, and it is only on the delivery of them that he is entitled to freight. If he is unwilling or unable to forward them, the freighter is entitled to receive them back without paying any freight. *ib.*

10. Where the completion of the voyage is prevented by a permanent blockade, and the vessel is unable to put to sea, and she returns after having proceeded to the mouth of the bay, on which her port of lading is situated, the ship owner is not entitled to freight *pro rata*, and the freighter is entitled to receive his goods, without paying freight, the blockade putting an end to the contract. *ib.*

11. By the blockade of the port of discharge, a charter party is dissolved, and all claim to freight under it is gone. *S. C. Per Thompson, Ch. J.* 15 *Johns. Rep.* 20.

12. In an action for the non-delivery of goods pursuant to a contract, of affreightment, the measure of damages is the value of the goods at the port of destination; but without interest, unless there has been fraud or gross misconduct on the part of the defendant. *Amory and others v. M'Gregor*, 15 *Johns. Rep.* 24.

13. Where the whole of a vessel is chartered to take a cargo at certain specified rates per ton, square foot, &c. if the freighter does not furnish a full cargo, the owner of the vessel is entitled to freight, not only for the cargo actually put on board but also for what the vessel could have taken had a full cargo been furnished. *Duffie v. Hayes*, 15 *Johns. Rep.* 327.

14. Where a vessel is chartered for a voyage out and home, for an entire sum of money, to be paid on her return, her return is a condition precedent to entitle the owner to freight, and if she is lost before commencing the homeward voyage, he can recover neither on the charter-party, nor on an implied *assumpsit* for the freight of the outward voyage; nor if the freighter had accepted the outward cargo, would he be entitled to a *pro rata* freight. *Penoyer and Luff v. Hallett*, 15 *Johns. Rep.* 332.

15. A contract of affreightment is not dissolved by a hostile blockade of the port of departure: the performance of it is merely suspended; and the ship owner or master may detain the goods until he can prosecute the voyage with safety, or the freighter may demand them, on tendering the full freight. *Palmer v. Lorillard.* 16 *Johns. Rep.* 348.

16. It is only when the voyage is broken up on the part of the ship owner or master, or the completion of it has become unlawful that the contract is dissolved. *ib.*

17. The plaintiffs, being shippers of goods, brought an action of *assumpsit*, on the bill of lading, against the ship owners, and averred a loss of the goods by negligence. The jury found that the vessel, in the beginning of *February*, proceeded from *Richmond*, where the goods were laden, in the prosecution of her voyage, and came to *Hampton Roads*, but finding the *Chesapeake* blockaded by a hostile squadron, and that it would be impossible to put to sea without being captured, went into *Norfolk*, and finally returned to *Richmond:* that in *September* following, the plaintiffs demanded their goods, in order to transport them to

New York, by land; but the master refused to deliver them unless he was paid half freight; and that a few days thereafter, in consequence of a violent storm and freshet, the vessel was sunk at the wharf, *without any fault or negligence of the defendants or their agents*, and the goods wholly ruined and spoiled. Held, that admitting that the plaintiffs had a cause of action, yet that in this form, and under this declaration; they were not entitled to recover, the jury having negatived the *gravamen* alleged, to wit, the *negligence* of the defendants; and that the court could not look to other facts found by the jury to support the action, as that would be to allow a party to declare in one form of action, and recover in another. *ib.*

18. But the plaintiffs had no cause of action, for the contract of affreightment was not discharged by the blockade, and the defendant had a right to retain the goods, until he could prosecute the voyage, or unless the plaintiffs tendered the whole freight, or unless the contract was rescinded by mutual agreement. *ib.*

19. The defendant hired the vessel of the plaintiffs to carry a cargo from *New York* to *P.* and back, with a return cargo, to *New York*, and covenanted to pay the plaintiffs for the charter and hire of the vessel "from *New York* to *P.* and back, 1400 dollars on the delivery of the cargo at *P.*, and 1400 dollars on the delivery of the return cargo, on the arrival of the vessel at *New York.*" The vessel proceeded with the cargo from *New York* and arrived in sight of *P.*, but the place being strictly blockaded by a *Portuguese* squadron he was forbidden to enter the port; and not being instructed to proceed to any other port, the master returned to *New York* with the cargo; and the plaintiffs offered the defendant to carry it back to *P.*, or to any port in its vicinity, as the defendant might direct, but the defendant having abandoned the cargo to the underwriters, who accepted it, declined the offer, and the cargo was afterwards demanded and received by the underwriters, who as well as the defendant refused to pay the freight; Held, that the plaintiffs were not entitled to any freight under the charter-party; the voyage not having been performed, nor the cargo delivered according to the conditions of the agreement, on the performance of which, the payment of the freight depended. *Burrill* vs. *Cleeman*, 17 *Johns. Rep.* 72.

20. Where the defendant, the owner of goods, shipped them on board the plaintiff's vessel, to be carried from *New York* to *Liverpool*, and there delivered to C., the *consignee, he paying for the same*, with primage and average accustomed, according to the bill of lading signed by the master, who, on his arrival at *Liverpool*, delivered the goods to the consignee, without receiving the freight, though he, afterwards, demanded it, but the payment was refused; *Held*, that the plaintiff might maintain an action for the freight against the consignor. *Barker* vs. *Havens*, 17 *Johns. Rep.* 234.

21. It *seems*, that when the goods are not owned by the *consignor* nor shipped for his account or benefit, the carrier is not entitled to call on him for the freight, on such a bill of lading. *ib.*

22. It is the duty of the master, in all cases, to endeavour to get the freight from the consignee. *ib.*

23. There is no difference between the passage money and freight, they are governed by the same rules of law in every particular. *Patten* vs. *Park*, *Anthon's Nisi Prius*, 34. *n. a.*

24. The jury may allow interest on freight after a demand. *Schureman* vs. *Withers*, *Anthon's Nisi Prius*, 166.

25. Where a vessel has been captured on her voyage, and condemned at an intermediate port, and a part of the cargo has been restored and sold at the same port, no freight is due for the cargo so restored. *Sampayo* vs. *Salter*, 1 *Mason Rep.* 43.

26. No freight is payable, when the voyage is broken up, after its commencement, by an interdiction of commerce with the port of destination, or by accident or superiour force. But if the cargo is accepted at an intermediate port, a *pro rata* freight is due. *Saratoga*, 2 *Gallison Rep.* 179.

27. Of the rules respecting freight and wages adopted by foreign writers. *ib.*

28. A neutral ship, engaged in transporting provisions for the use of the army of a belligerent, which army is in a neutral country and engaged in a distinct war with a third belligerent, is not entitled to freight. *The Commercen*, 2 *Gallison Rep.* 261.

29. In what cases, the neutral carrier forfeits his right to freight. *ib.*

30. Where, by a charter-party, A. let to B. for a certain voyage, the whole tonnage of his brig, and covenanted to deliver the cargo at the port of destination, dangers of the seas excepted, and also, that the brig should be tight, strong, and well manned and provisioned, &c. and the return cargo should be delivered to B. at the home port. And afterwards, by provisional sealed articles, it was among other things agreed between the parties, that the captain should be instructed by his owner to touch at Falmouth, and "there *to lay off and on twenty-four hours, or longer, if desired in day-light*, during which time there will come off orders from Mr. F., Mr. T. W., or Messrs. A. & Co." (the consignees;) and the captain was to proceed to such port, as these orders should state, of five specified ports; and if the vessel was detained over twenty-four hours at Falmouth, demurrage should be paid for the time at a stipulated rate; and the vessel proceeded to Falmouth Roads, and there no orders being ready, the vessel, by the orders of Mr. F., came immediately into port, *instead of laying off and on* for twenty-four hours, and was there seized and detained for eighty days, for a supposed breach of the Revenue Laws of Great Britain. On an action of covenant for demurrage during this period, alleging as a breach, that by the order of Mr. F. the brig was conveyed into the port of Falmouth, and by means thereof was there detained for the eighty days: It was *held* by the Court, 1st. That notwithstanding the charter-party and articles, A. remained owner for the voyage, and was answerable for any misconduct of the master, and that the covenant to lay off and on was his covenant as owner. 2dly. That if the going into Falmouth was a breach of the covenant, an action would lie for such breach, not for A. against B. but for B. against A., as the owner, for the wrongful act of his master. 3dly. That, in this case, the master having acted by the orders of B.'s agent in going into Falmouth, no action could be maintained by B. for the breach. 4thly. That no demurrage was due to A. in this case, the detention having been occasioned either by the misconduct of the master, for which A. alone was answerable, or having been done to avoid danger, and not having been occasioned by laying off and on the port of Falmouth to receive orders, or by any misconduct or breach of covenant by B., the true construction of the charter-party charging B. with demurrage only in the latter cases. *Hooe* v. *Groverman*, 1 *Cranch*, 214.

31. Where a vessel is chartered, and meets another vessel in distress in the course of her voyage, and one of the charterers is on board, and consents that a part of the crew may go on board the distressed vessel to assist in saving her, this does not change the situation of the parties under the charter-party, but the owner of the vessel still continues to risk the freight, and the assent of the charterer can only be construed to charge him with hazards to be encountered by the cargo, and not to vary the contract respecting the freight. *Mason* v. *The Blaireau*, 2 *Cranch*, 240.

32. To make a bottomry, executed by the master, a valid hypothecation, it is necessary to show that the master acted within the scope of his authority, or, in other words that the advances were made for repairs or supplies necessary for effectuating the objects of the voyage, or the safety and security of the ship; and no presumption should arise in the case, that such repairs or supplies could be procured upon reasonable terms with the credit of the owner, independent of such hypothecation. *The Aurora*, 1 *Wheat.* 96.

33. If the master have sufficient funds of the owner under his control, or can procure them on the general credit of the owner, to make a necessary repair, he has no authority to subject the ship to an hypothecation. *Ib.*

34. A bottomry bond given to pay off a former bottomry bond, must stand or fall with the first hypothecation; and the subsequent lenders can only claim upon the same ground as the former lenders, of whom they are virtually the assignees. *Ib.*

35. Where money has been advanced, under a stipulation for a bottomry bond, and the vessel is permitted to go to sea without any attempt to enforce the stipulation, it is to be deemed a waiver of the hypothecation, and the party cannot, on a subsequent voyage, insist upon a bottomry bond for his prior advances. *Ib.*

36. A *bona fide* creditor who advances his money to relieve a ship from an actual arrest, on account of debts incurred on the ship's account, may rightfully stipulate for a bottomry interest to secure him for such advances, and the master, if he has no other sufficient funds or credit, may execute a bottomry bond in his favour. *Ib.*

37. But it is very doubtful, if the arresting creditor

could entitle himself to such a bottomry bond by agreeing to withdraw his arrest. *The Aurora*, 1 *Wheat* 96.

38. If a person making advances for repairs, &c. has in his own hands funds of the owner, which he may apply to pay for repairs, he cannot entitle himself to a bottomry bond for advances made for such repairs. *Ib.*

39. It is incumbent on the lender on bottomry, to show the items of his claim, and if various demands are mixed up in his bond, some of which would, and some would not, support an hypothecation, it is his duty to separate them, and exhibit them to the Court distinctly, before he can claim a decree for any part of his advances. *Ib.*

40. A loss by general average is not a good ground of abandonment. *Lapsley* v. *Pleasants*, 4 *Binney Rep.* 502.

41. To constitute general average, it is necessary that the ship should be in distress, that a part should be voluntarily sacrificed to save the rest, and that the sacrifice should be conducive to the saving; but it seems that previous consultation between the officers and crew is not necessary; nor is it necessary that the part sacrificed should be exposed to greater danger by encountering the loss, than it would otherwise have been. As if, from the violence of the winds, a ship must go ashore somewhere, and she chooses a place, where she will be at least as safe as she could be any where else, still if she selects her place, and incurs a certain loss thereby for the common benefit, it is general average. *Sims* v. *Gurney*, 4 *Binney Rep.* 513.

42. If a vessel founders, the carrier must prove that she was seaworthy, before he can bring himself within the excuse of its being the act of God; but she need only be seaworthy for the trade in which she is employed. That which would constitute seaworthiness for a short voyage upon the lakes, may not be seaworthiness for a voyage upon the ocean. *Bell* v. *Reed*, 4 *Binney Rep.* 127.

43. If the facts of a loss at sea are such, as that it may be fairly attributed to inevitable accident, and the owner of the goods means to allege that the vessel was not seaworthy at her departure, the *onus probandi* lies on him, and not on the carrier. *ib.*

44. The man who undertakes to transport goods by water for hire, is bound to provide a vessel sufficient in all respects for the voyage, well manned and furnished with

sails, cordage, anchors, and all necessary furniture. If a loss happens through a defect in any of these respects, the carrier must make it good. *ib.*

45. A carrier's vessel must be seaworthy, or he must answer, although the loss does not proceed from unseaworthiness. *ib.*

46. A cargo of flour and wheat was shipped from *Philadelphia* to *Fayal*, and from thence at the discretion of the shippers to two other ports; ten running days to be allowed at each port the vessel might stop at, to determine upon the expediency of unlading or proceeding, and twenty-five working days at her port of discharge, for the discharge of her cargo. In case of further detention, a demurrage of fifty dollars per day to be allowed for every day she was detained, which should not be longer than thirty days. Freight at the rate of one dollar and seventy-five cents per barrel, if she discharged at *Fayal*, and twenty-five cents for each subsequent port. The vessel arrived on the 14th of *February* at *Cadiz*, which was selected as her port of discharge; and on the 17th the captain desired and offered to unlade the cargo. The supercargo refused to receive it, insisting on his right to keep it on board the twenty-five days; and within this period the vessel and cargo were lost. *Held* that the supercargo was not bound to receive the cargo during the twenty-five working days; and it being lost within that period, no freight was earned, notwithstanding there had been time and opportunity and an offer by the captain to discharge it. *Lacombe* v. *Waln*, 4 *Binney*, 299.

47. *Quære* whether freight is earned when the working days at the port of discharge expire; or whether it is not contingent during the days allowed on demurrage, and even until the cargo is actually landed, if the landing is not prohibited. *ib.*

48. Ship and freight were insured at and from *Philadelphia* to *St. Barts*. On her voyage the vessel was so much injured by storms, as to be under the necessity of putting into *Jamaica*; and upon being surveyed, it was found that her repairs would cost more than she would be worth when repaired. The master, who was consignee of the cargo, made inquiry for another vessel to carry it on to *St. Barts*; but the only one that could be procured, was not large enough to take more than half the cargo, and for her

an exorbitant freight was demanded. In consequence of this the vessel was broken up, and together with the cargo sold for the benefit of all concerned. Upon receiving advice of the facts, the owners abandoned to the underwriters on ship and freight, and also to the underwriters on cargo. *Held*, that as the goods were not *voluntarily* accepted by the owners at the intermediate port, no freight *pro rata* was due, and therefore the assured were entitled to recover a total loss on both policies. *Callender* vs. *The Ins. Co. of North-America*, 5 *Binney* 525.

49. A factor cannot pledge the goods of his principal for his own debts; and if he does, the principal may after a demand and refusal maintain trover for them against the pawnee. *Van Amringe* vs. *Peabody*, 1 *Mason Rep.* 440.

50. A hostile investment or blockade of the port of departure does not dissolve a contract of charter-party; and the master or owner of the vessel has a right to retain the goods, until he can prosecute the voyage with safety, or the freighter tenders the whole freight and demands his goods. *Ogden* vs. *Barker and others*, 18 *Johns. Rep.* 87.

51. Where a contract of affreightment, or charter-party was executed by the plaintiff and defendant, under their seals, for the transportation of goods from a port in *Virginia* to *Cadiz*, and the parties, on the same day, (*January* 26, 1813) made an agreement on a separate paper, not under seal, referring to the charter-party executed by them, and stipulating that the owner should have on board a *Sidmouth license* for the protection of the ship and cargo; *Held*, that these were several and distinct contracts, and the supplementary agreement being illegal and void, did not affect or vitiate the charter-party, which remained valid and binding. *ib.*

52. The right to retain goods for the freight, grows out of the usage of trade, and does not exist where the parties have, by their agreement, regulated the time and manner of paying the freight, especially where the cargo is to be delivered before the time fixed for the payment of the freight. *Chandler and Talbot* vs. *Belden*, 18 *Johns. Rep.* 157.

53. The legal property in goods passes by a bill of lading, and an assignment thereof, *bona fide*, and for a fair consideration, though the assignment be made after the ar-

rival of the goods in port: and where the ship owner, not having a *lien* for the freight, sold the goods at auction to pay freight, it was held to be a conversion of them, and that trover would lie at the suit of the person to whom the bill of lading was assigned. *ib.*

54. A vessel was chartered from *Boston* to the coast of *Africa* and back to the *United States* at a certain rate per month, and at that rate for a less time, as she should be continued in the said service in thirty days after her return to *Boston*. She touched and traded at several places on the coast, and returning to the *United States* was captured. It was holden that hire was due from the inception of the voyage, until the expiration of half the time spent at the last place visited by the vessel on the coast for the purpose of trade. *Locke* vs. *Swan*, 13 *Mass. Rep.* 76.

55. A registered vessel, bound coast-wise from the port of *Boston* to another port in the *United States*, and from such other port to a foreign country, is a coaster within the exception of the Mass. Statute 1796, c. 85. § 2. for regulating pilotage, and so is not obliged to take a branch pilot on board. *Tilley* vs. *Farrow*, 14 *Mass. Rep.* 17.

56. A vessel was chartered for a voyage at a certain hire per month, so long as she should be continued in the service of the hirers, who were to victual and man the vessel and pay all port charges. On her passage home she was captured as a prize, and detained several months, but was finally restored, and arrived at her port of destination—held that the owners were entitled to the hire as stipulated by the charter-party without any deduction for the time of the detention in consequence of the capture. *Spafford & al.* vs. *Dodge & al.* 14 *Mass. Rep.* 66.

57. In the above case the costs and charges paid by the hirer, in procuring the restoration of the vessel and cargo, were allowed as a general average on vessel, cargo and freight, according to the value of each at the place of detention.—*Ibid.*

58. The wages and provisions of the crew, during the detention were not allowed on a general average.—*Ibid.*

59. A master of a vessel has lawful authority to inflict punishment especially for any past offence; although it is not inflicted for the purpose of coercion to duty, and although no mutiny or disorder exists at the moment—it not

being necessary that the punishment should immediately follow the offence. *Sampson* vs. *Smith*, 15 *Mass. Rep.* 368.

60. As to the nature and limits of the power which the master of a vessel has to enforce obedience among his crew by violent punishments, see the above case.—*Ibid.*

61. The underwriters upon a cargo are not liable for freight *pro rata itineris*; to the owner of the vessel who is also owner of the cargo insured, in a case where the vessel and cargo were captured, the cargo abandoned to the underwriters as a total loss, and by them accepted, the loss paid, the cargo condemned, restored upon appeal and the proceeds of its sale paid over to the underwriters. Freight *pro rata itineris* is not due unless the owner of the cargo voluntarily agree to receive it at a place short of its ultimate destination. *Carze et. al.* vs. *Balt. Ins. Company*, 7 *Cranch. Rep.* 358.

62. If a neutral vessel be captured on her outward voyage from *England* to *Amelia Islands*, carrying a hostile cargo which is condemned, and if by the charter-party the outward cargo is to be carried free of freight, but the homeward cargo is to pay at a certain rate to be ascertained by the nature of the cargo; yet the court will decree freight *pro rata itineris* of the outward cargo, to be assessed upon the principle of *quantum meruit*. *The ship Societe*, 9 *Cranch.* 209.

PART IV.

OF THE WAGES OF MERCHANT SEAMEN.

1. If a seaman leave the ship without any fault of his own, he may recover the whole or any part of his wages accruing during the voyage, according to the circumstances.—*Luscomb, Adm'r*, vs. *Prince & al.* xii. *Mass. Rep.* 576.

2. So, if a seaman die during a voyage, his representatives may recover what is due at the time of his death.—*Ibid.*

3. Where a seaman on board a ship voluntarily left the the ship, with the consent and by the request of the master, to serve on board another ship armed as a convoy; it was determined that he was entitled to his wages from the

master of the former vessel, until her arrival at her port of discharge, but no longer; for by going as a volunteer on board the convoy he assumed the risk of a longer detention.—*Wilson* vs. *Bragdon*, x. *Mass. Rep.* 79.

4. If a seaman be hired for a voyage, and the ship earn one freight or more, and afterwards be lost before completing her voyage, the seaman is entitled to his wages to the last port of delivery, and for half the time that the ship lies in that port.—*Hooper* vs. *Perley*, xi. *Mass. Rep.* 545.

5. And, if a ship on her outward voyage be seized and carried into any port out of the course of her voyage, and be afterwards restored to the master, and arrive safely at her port of delivery, the seaman is entitled to his wages for the whole time of such detention, although the ship be lost on her return voyage.—*Ibid.*

6. On the other hand, if a ship be detained in like manner on her homeward voyage, and be afterwards lost, the seaman will lose his wages for the time of such detention, as well as for all the other time consumed on the homeward voyage.—*Ibid.*

7. If a vessel be seized and condemned, while on her voyage, for a violation of the revenue laws of a foreign state, the seamen will not be entitled to their wages after the seizure.—*Oxnard* vs. *Dean & al.* x. *Mass. Rep.* 143.

8. Nor are seamen entitled to wages after the capture of the ship, although they be forbidden by the master to leave the ship; for upon the capture the relation between the owners and master and crew ceases.—*Lemon* vs. *Walker & al.* ix. *Mass. Rep.* 404. *Arfridson* vs. *Ladd*, xii. *Mass. Rep.* 173.

9. But, although the master be entitled to nothing, *quasi* wages, after the capture of the ship; yet, if he remain to claim the property for the benefit of the owners, and incur expenses on that account, he may recover in *indebitatis assumpsit* an indemnity against the owners of the property, notwithstanding the dissolution of the contract.—*Arfridson* vs. *Ladd*, xii. *Mass. Rep.* 173.

10. And, if a person be employed as a flag-captain, that is, to assume the character and duties of captain on special occasions only, for the purpose of protecting the property as neutral, the contract will not be dissolved by a capture

of the vessel; but he will be entitled to his wages from the time he departed on his voyage until his return.—*Ibid.*

11. It is generally true, that a mariner has a threefold remedy for the recovery of his wages, viz. upon the vessel, the owners, and the master.—*Aspinwall Adm'r*, vs. *Bartlett*, viii. *Mass. Rep.* 483. *Goodridge & al.* vs. *Lord*, x. *Mass. Rep.* 483.

12. A privateersman, who has contributed to the taking of prizes, is entitled to his share of those captured during the cruise, although he may have been disabled before the end of the cruise from aiding in such captures.—*Luscomb, Adm'r*, vs. *Prince & al.* xii. *Mass. Rep.* 576.

13. But, when the disability is occasioned by his own misconduct, he ought not to share in prizes which he did not assist in taking.—*Ibid.*

14. Thus, if a privateersman be confined for mutiny; and, while he continues so confined, prizes be taken, he is not entitled to a share of such prizes.—*Ibid.*

15. Where it was agreed between the officers and crew of a privateer, that any one guilty of certain offences should be punished at the discretion of the officers, even to the forfeiture of his share of the prizes which they might take, and one of the crew, being guilty of an offence within the agreement, was sentenced to receive corporeal punishment, which was accordingly inflicted; it was held that, as no other punishment had been determined upon for the offence, it did not amount to a forfeiture of his share of the prizes.—*Ibid.*

16. If, during a voyage, a seaman is compelled to leave the ship, on account of ill usage and cruel treatment, by the master or through his agency, and for fear of his personal safety, it is not a case of voluntary desertion and the seaman is entitled to his full wages for the whole voyage. *Ward* vs. *Ames*, 9 *Johns. Rep.* 138.

17. A seaman signed articles for a voyage, as he understood, and as was represented to him by the master, from *New York* to *Archangel* and back; though the articles were, in fact, for a voyage from *Middletown, Connecticut*, to any port or ports in *Europe*, for three years and back to the *United States*. The vessel went from *New York* to *Sicily, Sardinia*, and *Messina*, at which places she disposed of her outward cargo, and took in a load of salt, at *Messina*, where

she lay seven months, during most of which time the captain was absent. She left *Messina*, for *Gottenburgh*, and was afterwards captured off *Minorca*, by a *French* privateer, and carried into *Tobago* in *Africa*, and there condemned. The seaman brought an action to recover his wages for the whole voyage, and also for a breach of the shipping articles. It was held, that he was entitled to wages from *New York* to *Messina*, and during the stay there, the detention being an act of the captain; but not from *Messina*, that being a new and intermediate voyage; and the capture put an end to the freight, as well as the wages for that voyage. *Murray* vs. *Kellogg*, 9 *Johns. Rep.* 227.

18. Seamen signed articles for a voyage from *New York* to *North Carolina*, and thence to a port in *Europe*. The vessel went from *New York* to *North Carolina* in ballast, and there took in a cargo and sailed for *Europe*; but was compelled in consequence of springing a leak, to put into *New York* for repairs. The seamen made no application, under the law of the *United States*, for repairs; but the owners voluntarily caused repairs to be made; and after the repairs, the vessel was, in the opinion of the master carpenter and three shipbuilders, perfectly seaworthy; though *seven* journeymen carpenters were of opinion that she was not seaworthy; and on that ground the seamen refused to proceed on the voyage. No freight was earned at *New York*, the cargo having been landed, for the purpose only of repairs, and was reladen when they were completed. In an action brought by one of the seamen for wages, it was held, that he was not entitled to recover, there being no freight earned, nor any loss of voyage imputable to the master or owners. *Porter* vs. *Andrews*, 9 *Johns. Rep.* 350.

19. Where a voyage is broken up, not from necessity, or in consequence of the perils of the sea, but from the act of the master or owners, the seamen are entitled to payment of their wages to the time, and also for a reasonable time to be allowed for their return home. *Sullivan* vs. *Morgan*, 11 *Johns. Rep.* 66.

20. Whether seamen can maintain an action against the owners of the vessel for the two months' wages allowed by the act of congress of the 28th *February*, 1803, (cong. 7. sess. 1. c. 52. s. 3.) where the vessel is sold, and the seamen discharged in a foreign country? *Quere.* *ib.*

21. The master is chargeable for wages only on his special contract in hiring the seamen. *Wysham* vs. *Rossen*, 11 *Johns. Rep.* 72.

22. And the owners from the implied contract which they were supposed to make through their agent the master. *ib.*

23. Where seamen are shipped for a voyage, and during the outward passage the vessel is captured and carried into a port of the captor, where the master leaves her, and she is afterwards released, and instead of prosecuting the original voyage, returns home with the same crew, under the command of A. who had been subsequently appointed by the owners to take charge of the vessel, this is a new and distinct voyage, and A. is liable only for the wages arising while he was master, and not for the wages which had accrued whilst the vessel was under the former commander. *ib.*

24. Whether if A. had prosecuted the original voyage, he would be deemed to have assumed the contract of the seamen with the former master? *quere.* *ib.*

25. If freight is totally lost by disaster, peril or force, without fraud or misconduct of the master or owners, the seamen lose their wages. *Icard* vs. *Goold*, 11 *Johns Rep.* 279.

26. Insurance of freight is for the indemnity of the owners only, and does not enure to the benefit of the seaman's wages, which cannot be insured directly or indirectly. *ib.*

27. No action can be maintained by a seaman, discharged by his own consent in a foreign country, under the act of congress, (7 cong. sess. 2. ch. 62. s. 3.) against the owner of the vessel, to recover two thirds of three months wages, directed by that act to be paid, by the master of the vessel, to the *American* consul, over and above the wages due to such seaman at the time of such discharge. *Ogden* vs. *Orr*, 12 *Johns. Rep.* 143.

28. Where a ship, captured during her voyage, and her crew taken out and detained prisoners of war, was afterwards recaptured, and (the master having hired a new crew) proceeded on her voyage, and arrived at her last port of delivery, and earned freight; it was held, that the seamen, who were taken out, though never restored to the ship, were entitled to wages for the whole voyage deduct-

ing only their proportion of the *salvage* paid to the recaptors. *Wetmore and another* vs. *Henshaw*, 12 *Johns. Rep.* 324.

29. Where a seaman, who had signed shipping articles, by which he engaged not to absent himself from the vessel without leave, *until the voyage was ended and the vessel discharged of her cargo*, on the vessel arriving at her last port of discharge, and being there safely moored, refused to remain and assist in discharging the cargo, but absented himself without leave, it was held, that by such desertion he had forfeited his wages. *Webb* vs. *Duckingfield*, 13 *Johns. Rep.* 390.

30. Though the master has no right to insert in the shipping articles any stipulation, or agreement, repugnant to the laws of the *United States*, yet he may add any provisions consistent with the laws relative to seamen. *ib.*

31. The contract with a seaman continues in force until the cargo is finally discharged, before which, if he leaves the ship, he is not entitled to wages. *ib.*

32. Where a person becomes surety to the owner of a vessel, that certain seamen, shipped on board the vessel, shall proceed upon the voyage, and the seamen receive wages in advance, which they pay to their surety as his indemnity, in case the seamen desert the vessel before the commencement of the voyage, the owner cannot maintain an action for money had and received, against the surety, to recover back the wages advanced. *Dodge* vs. *Lean*, 13 *Johns. Rep.* 508.

33. Where in shipping articles of seamen, a person has signed his name under a column headed "sureties," but there is no explanation added as to the extent of his undertaking, it is not a sufficient writing within the statute of frauds, and the undertaking is void. *ib.*

34. The master of a vessel may inflict moderate correction for sufficient cause upon his seamen; but should he exceed the bounds of moderation, and be guilty of cruelty, or unnecessary severity, he will be liable as a trepasser. *Brown and others* vs. *Howard*, 14 *Johns. Rep.* 119.

35. Where a crew has been shipped for a voyage, and articles have been regularly entered into, fixing the rate of wages, if the crew at an intermediate port on the voyage, compel the master, by threats of desertion, to enter

into new articles, at a higher rate of wages, such articles are void, and not binding upon the master, as they are contrary to the policy of the act of congress of the 20th of *July*, 1790, and, if established, would be holding out an inducement to a violation both of duty and of contract. *Bartlett* vs. *Wyman*, 14 *Johns. Rep.* 260.

36. Nor are they binding upon the owners, the master having no authority to make them, they being already bound by the shipping articles already entered into. *ib.*

37. And such promise is void for want of consideration, the seamen having no right to abandon the voyage. *ib.*

38. The written agreement or shipping articles, made at the port of departure, are the only legal evidence of the contract; and a mariner can recover nothing but what is specified therein. *ib.*

39. Upon breach of contract seamen are entitled to wages until their return home. *Administrator of Patten* vs. *Park*, *Anthon's Nisi Prius*, 32.

40. Where a vessel on a voyage, merely earns passage money, and no regular freight, how far seamen are entitled to their wages. *id.* 34. *and n.* (*a*)

41. The master is not bound to pay the seamen until the cargo is discharged. *Schieffilin* vs. *Harvey*, *Anthon's Nisi Prius*, 59. *n. a.*

42. Where the wages of a seaman appear, by the shipping articles, evidence of a further compensation by way of customary privilege cannot be received. *Bogert* vs. *Cauman*, *Anthon's Nisi Prius*, 70. *and n. a.*

43. In an action by the master of a ship, for his wages, against the defendant, as owner, and who held an absolute bill of sale from M. as well as a register of the ship, in his own name, the defendant may prove by parol that the bill of sale was given to him merely as collateral security, by way of mortgage. *Champlin* vs. *Butler*, 18 *Johns. Rep.* 169.

44. A mortgagee of a ship, in possession, is liable to the master, for his wages, if the voyage be performed for the benefit of the mortgagee. *ib.*

45. But where the master made a special agreement as to his wages, with M. the real owner or mortgagor, and with full knowledge of a secret agreement between M. and the defendant, who had no interest in the voyage, but

merely lent his name to cover the voyage, for the benefit of M. and without receiving any freight or profit, the plaintiff was held bound by his special agreement, and could not waive it, and sue the defendant as owner. *ib.*

46. Where a vessel has been captured and condemned, though the owner recovers the amount of freight from the insurers, the seamen have not, therefore, a right to receive their wages. *Per Spencer, Ch. J. Percival* vs. *Hickey*, 18 *Johns. Rep.* 257.

47. So, where a neutral vessel was run foul of and sunk by a belligerent cruiser, through *negligence*, the seamen are not entitled to wages, though the owner, in an action of trespass against the commander of the belligerent ship, recovered the full value of the vessel and cargo. *ib.*

48. Of the effect of capture upon the contract for mariner's wages. *Emerson* vs. *Howland*, 1 *Mason Rep.* 45.

49. Where seamen are discharged abroad without the payment of the three months wages required by the act of Congress of the 28th of February, 1803, ch. 62, on a libel for wages the court will enforce the payment of the three months wages. *ib.*

50. Where an embezzlement takes place on board of a ship, the seamen are not liable to contribute out of their wages, unless it was caused by their fraud, connivance or negligence; or, if the offender is unknown, unless a presumption of guilt is fixed upon all the crew, or at least on those who are called upon to contribute. *Spurr* vs. *Pearson*, 1 *Mason Rep.* 104.

51 One seaman may be a witness for another in any suit respecting the same voyage, although interested in the question, if not interested in the event of the suit. *ib.*

52. An endeavour to make a revolt within the act of the 30th of April, 1790, ch. 9, sect. 12, is an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is in effect an endeavour to make a mutiny among the crew of the ship. *United States* vs. *Smith*, 1 *Mason Rep.* 147.

53. If a mariner, shipped for a cruise, be disabled and leave the privateer, by common consent, before the cruise has commenced, he is not entitled to a share of prizes. *Ex parte, Giddings*, 2 *Gallison Rep.* 56.

54. *Aliter*, if he were disabled, during the cruise; and,

in such case, on board of a merchant ship, he would be entitled to his full wages during the voyage. *ib.*

55. The contract for mariners' wages is not dissolved by capture, unless followed by condemnation. During the prize proceedings it is suspended, and by restitution or recapture, the parties are remitted to their former rights. *The Saratoga*, 2 *Gallison Rep.* 164, 176.

56. Seamen, after a capture, have a right to remain by the ship.—*Quære*, at what time, they may lawfully quit the ship? *ib.*

57. If, pending the voyage, there be an interdiction of commerce with the port of destination, by war or otherwise, and in consequence the voyage is broken up, no wages are due. But if the mariners be subsequently retained by the master to refit and repair the ship, they are entitled to a reasonable compensation in the nature of wages. And if afterwards discharged in a foreign port, the mariners are entitled to two months pay, provided by the act (28th Feb. 1803) and may recover it, if unpaid, by a suit in the Admiralty. *ib.*

58. Of the exceptions to the rule, that, to entitle to wages, freight must be earned. *The Saratoga*, 2 *Gallison Rep.* 164.

59. A mariner shipped on a voyage "to the *Pacific*, *Indian* and *Chinese Oceans*, *or elsewhere*, on a trading voyage; and from thence back to *Boston*," with a stipulation that two months wages should be paid on arrival at *Canton;* the voyage being in fact a trading voyage to the *Northwest Coast* for furs;

It was held, that the outward voyage terminated at *Canton*, and that the shipping articles did not authorize a return from *Canton* to the *Northwest Coast*, and that therefore, it was not a desertion in a mariner to leave the ship at *Canton*, it being the intention of the master to return to the *Coast*. *Brown* vs. *Jones*, 2 *Gallison Rep.* 477.

60. It seems a "trading voyage" does not include a "freighting voyage." *ib.*

61. The words "or elsewhere" in the shipping articles, are either void for uncertainty, under the act of Congress regulating mariners in the merchants' service, or are to be construed as subordinate to the principal voyage stated in the articles. *ib.*

62. The statute of limitations of *Massachusetts* applies only to suits at common law for mariners' wages, and not to suits in the Admiralty. *ib.*

63. Though a "trading" and not a "freighting" voyage, is described in the articles; yet the taking on board of goods on "freight" is not a deviation, to discharge the seamen, if it occasion no unnecessary or unusual delay—but the seamen, in such case, are not bound to remain by the ship for the purpose of unlading the freighted cargo. *ib.* 482.

64. A master of a vessel has a right to retain freight received by him, against the owner, or his assignee, as a general creditor. *Hodgson* v. *Butts*, 3 *Cranch*, 140.

65. A master of a vessel is bound to save for his owners the ship and cargo confided to his care, by all means in his power, but he is not bound to employ fraud in order to effect the object, even as against an enemy. *Hannay*, v. *Eve*, 3 *Cranch*, 242.

66. If a slave be a mariner on board a ship, on wages, and desert during the voyage, the master of the ship, if he has acted with good faith, is not responsible to the owner of the slave for his desertion. *Beverly* v. *Brooke*, 2 *Wheat.* 100.

67. A mariner forfeits his wages by an embezzlement of any part of the cargo. *Mason* v. *The Blaireau*, 2 *Cranch*, 240.

68. A master of a vessel is entitled to his wages, in case the vessel is captured, up to the time of the capture. *Moore* vs. *Jones et al.* 15 *Mass. Rep.* 424.

69. Where a mariner engaged for a voyage and it was stipulated, that no officer or seaman should be entitled to any part of his wages until the arrival of the ship at her port of discharge in the *United States*, and her cargo delivered; the ship was lost on her passage to the *United States*; the mariner was held to be entitled to his wages up to the last port of lading; and during half the time of lying in such port. *Swift* vs. *Clark*, 15 *Mass. Rep.* 173.

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